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United States District Court

EASTERN DISTRICT OF NEW YORK

ROBERT A. McALLISTER,

Libellant,

against

UNITED STATES OF AMERICA,

Respondent.

19707

Extract of Docket Entries.

1951

July 5—Libel filed.

July 24—Respondent's exceptions to libel filed with notice of hearing thereon.

Oct. 22—By Abruzzo, J. Order filed (dated Oct. 19, 1951), overruling exceptions in all respects.

Nov. 16—Answer filed.

Dec. 7—Respondent's interrogatories filed.

1952

Jan. 9—Before Rayfiel, J. Motion to strike paragraphs of answer argued, submitted, decision reserved.

Feb. 18—By Rayfiel, J. Order requiring amended answer filed.

April 4—Libellant's interrogatories filed.

April 16—Respondent's exceptions to libellant's interrogatories filed.

Aug. 13—Amended answer of U. S. A. filed.

Oct. 15—Answers of libellant to interrogatories filed.

Oct. 15—Exceptions of U. S. A. filed to answers to interrogatories and notice of hearing thereon.

Nov. 5—Before Abruzzo, J. Motion argued and granted as indicated.

Extract of Docket Entries.

Nov. 7—Further answers to respondent's interrogatories filed.

Nov. 13—Interrogatories propounded to the respondent filed.

1953

Jan. 12—Answers of respondent to interrogatories filed.

Jan. 12—Respondent's request for admissions of facts filed.

Jan. 12—Inch, J. Trial began.

Jan. 13—Trial resumed.

Jan. 14—Trial resumed.

5 Jan. 15—Trial resumed.

Jan. 21—Trial resumed and concluded. Decision reserved.

Mar. 11—By Inch, J. Findings of fact and conclusions of law and opinion filed. Decree for libellant.

Mar. 20—Bill of costs in the amount of \$51.50 filed.

Mar. 20—By Inch, J. Final decree filed for \$80,051.50. Judgment docketed against U. S. A. in favor of libellant.

Apr. 8—Respondent's notice of appeal filed.

Apr. 8—Respondent's assignment of errors filed.

May 4—Libellant's notice of appeal filed.

May 4—Libellant's assignment of errors filed.

6 May 12—By Inch, J. Order extending time to file record on appeal to July 7, 1953, filed.

Libel.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. McALLISTER,

Libellant,

against

UNITED STATES OF AMERICA,

Respondent.

19707

To the Honorable Judges of the United States District Court for the Eastern District of New York:

This is an action against the United States of America, predicated on the provisions of Public Law 877, 81st Congress, under Special Rules for seamen to sue, without costs or prepayment of fees.

FOR A FIRST CAUSE OF ACTION:

FIRST: That prior to the commencement of this action, and on the 5th day of February, 1951, a formal claim, pursuant to Public Law No. 17—78th Congress (H. R. 133) was forwarded to the War Shipping Administration and due notice of said claim was received by Cosmopolitan Shipping Co. Inc., agent and operator of the S. S. "Edward B. Haines". More than sixty days have elapsed since the filing of said claim, and said claim is deemed to have been administratively disallowed.

SECOND: That at all the times hereinafter mentioned, the respondent was and is a corporation sovereign, which has by law consented to be sued.

THIRD: That at all the times hereinafter mentioned, the respondent owned, managed, operated and controlled

a certain steamship or vessel known as the S. S. "Edward B. Haines".

FOURTH: That at all the times hereinafter mentioned, the libellant was employed by the respondent aboard the vessel aforementioned in the capacity of a seaman.

FIFTH: That at all the times hereinafter mentioned, the libellant was a seaman employed aboard the vessel aforementioned by the respondent herein as were all officers and other members of the crew, as 2nd assistant engineer.

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SIXTH: That at the time of the filing of this libel, the libellant was a resident of the Borough of Brooklyn, City and State of New York.

SEVENTH: That at the time of the filing of this libel, the respondent had an office for the transaction of business within the jurisdiction of this Honorable Court.

EIGHTH: That this Court has jurisdiction over the parties hereto and subject matter herein.

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NINTH: That the venue is properly laid within the jurisdiction of this Court.

TENTH: That at the time of the commencement of this action and for the purposes of venue and jurisdiction, the vessel aforementioned was within or about to come within the jurisdiction of the Eastern District of New York.

ELEVENTH: That at all the times hereinafter mentioned, there were in force and effect various laws of Congress, including 46 U. S. C. § 688 and 46 U. S. C. § 741 et seq. to the benefits of which the libellant is entitled.

ELEVENTH A: That on the 16th day of July, 1946, an action was duly instituted by Robert A. McAllister against

the general agent of the respondent, to wit, Cosmopolitan Shipping Co. Inc., in the United States District Court for the Southern District of New York, which action was tried before Hon. Alfred C. Cox and a jury on the 2nd, 3rd, 4th, 5th, 6th and 9th days of February, 1948, and which resulted in a verdict in favor of Robert A. McAllister in the sum of \$100,000, on which verdict judgment was entered on the 24th day of February, 1948. An appeal from said judgment was taken to the Court of Appeals for the Second Circuit and the judgment of the Court below was affirmed on the 23rd day of July, 1948. That on the 22nd day of November, 1948, a writ of certiorari was granted by the Supreme Court of the United States. That on the 27th day of June, 1949, the Supreme Court of the United States dismissed the complaint.

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TWELFTH: That there is now in force and effect an Act of Congress known as Public Law 877—81st Congress, the provisions of which, in substance, authorizes the institution and prosecution of the above entitled action. The aforementioned Act of Congress, in substance, provides that where a maritime action timely instituted against the general agent of the respondent is dismissed by reason of the fact that the improper party defendant has been sued, that an action against the United States of America may be brought within one year after the passage of the aforesaid Act, which was passed on the 13th day of December, 1950.

15

THIRTEENTH: That Robert A. McAllister sued Cosmopolitan Shipping Co. Inc., pursuant to the provisions of the Jones Act, 46 U. S. C. § 688, which provides that an action by a seaman against his employer based on negligence be instituted within three years.

FOURTEENTH: That prior to the employment of the libellant by the respondent, libellant was examined by a duly licensed doctor acting on behalf of the respondent,

which doctor passed libellant as physically fit to engage in the capacity of a seaman on the contemplated voyage.

FIFTEENTH: That prior to libellant's employment aboard the vessel aforementioned, he was in good health.

SIXTEENTH: That the libellant sailed with the aforementioned vessel from New York on July 24, 1945 for the Far East. The vessel arrived at Shanghai on September 26, 1945 and remained there until November 1, 1945 and then made a trip to Hong Kong and returned to Shanghai on November 11, 1945. That on November 23, 1945, the vessel left Shanghai, arrived at Tsing Tao on November 25th and docked on November 28th, where it remained up to and including November 30th, 1945.

SEVENTEENTH: That on or about the 21st day of November, 1945, libellant was confined to his bed aboard the vessel aforementioned, which fact was known to the chief mate, who in turn informed the master, in substance, that the libellant was ill and confined to his bed. That at the time in question, the master had had notices posted and had otherwise instructed the personnel of the vessel to take precautions against various contagious diseases, including polio, the existence of which was known to the master and various officers of the vessel, including the chief mate.

EIGHTEENTH: That on or about the 21st day of November, 1945, and for some time theretofore and thereafter there were doctors available to examine and treat the libellant. That there was an army base within easy reach of the vessel to which libellant could have been sent for treatment and which base had doctors available to treat libellant. In addition to the foregoing, there were both an army and navy hospital ship in the harbor with facilities to provide medical attention and hospitalization to the libellant.

NINETEENTH: That the libellant received no medical treatment or hospitalization and was not removed from the vessel until the 30th day of November, 1945.

TWENTIETH: That in addition to the foregoing, the respondent caused, allowed and permitted various shore people to come aboard the vessel at Shanghai to do stevedoring work. That during the times aforementioned, the respondent caused, allowed and permitted members of the local armed forces and other persons to board the vessel as passengers.

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TWENTY-FIRST: That at all the times hereinafter mentioned, the respondent caused, allowed and permitted certain toilet facilities to be built on the deck where the sewerage disposal was not drained off through pipes or other enclosures, but down an open chute built over the deck. That the respondent permitted the toilet facilities to remain unworked so that they could be used indiscriminately by any person aboard the vessel.

TWENTY-SECOND: That the respondent maintained a common drinking fountain or fountains aboard the vessel.

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TWENTY-THIRD: That during the times aforementioned, the respondent hired or otherwise caused, allowed and permitted two Chinese cooks to come aboard the vessel at Shanghai and use the same cooking utensils and handle the same food as the other cooks aboard the vessel.

TWENTY-FOURTH: That by reason of the foregoing, the respondent was guilty of negligence. That the negligent acts of the respondent as aforesaid caused or contributed to the libellant becoming sick, ill and disabled and caused his illness to become seriously aggravated, and by reason of the respondent's failure to provide prompt, adequate and proper medical aid, nursing care and treatment the libellant's condition was seriously aggravated, and the libellant

was otherwise carelessly, recklessly and negligently treated, all of which resulted in his suffering severe, painful and permanent illness and disability and incapacitated him from attending to his usual duties or vocation, resulting in libellant suffering a loss of earnings, which earning capacity has been permanently impaired, and libellant was otherwise injured all to his damage in the sum of Five Hundred Thousand (\$500,000.00) Dollars.

TWENTY-FIFTH: That at all the times hereinafter mentioned, there was in force and effect a contract between the respondent and Cosmopolitan Shipping Co. Inc., commonly known as a General Agency Agreement, which provided in part as follows:

"* * * the United States shall also reimburse the General Agent * * * maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, * * *." Article 7

"The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities * * *." Article 8

TWENTY-SIXTH: That pursuant to the terms of the afore-said agreement, the respondent undertook to and did inves-

tigate the facts and circumstances surrounding the aforesaid occurrence, illness and injury to the libellant.

TWENTY-SEVENTH: That thereafter when suit was instituted against respondent's general agent, Cosmopolitan Shipping Co. Inc., the respondent undertook to and did defend the aforesaid action in the name of its general agent. That the respondent supervised the entire preparation for and defense of the action.

TWENTY-EIGHTH: That the respondent paid for or reimbursed the general agent for its legal expenses, including attorneys' fees and trial counsel fees and all expenses incidental to the defense of the aforesaid action.

TWENTY-NINTH: That the action against Cosmopolitan Shipping Co. Inc., resulted in a verdict in favor of the plaintiff therein, who is the libellant herein, in the sum of \$100,000.

THIRTIETH: That the respondent ordered and directed an appeal to be taken from said judgment and paid for or reimbursed the general agent for expenses and legal fees incidental with the aforesaid appeal.

THIRTY-FIRST: That after the Court of Appeals for the Second Circuit unanimously affirmed the judgment of the Court below, the respondent herein ordered and directed its own legal department directly or in conjunction with the attorney retained through its general agent to petition the Supreme Court of the United States for a writ of certiorari.

THIRTY-SECOND: That the respondent directly through its own legal department or in conjunction with the attorneys retained on its behalf by the general agent, undertook to and did petition the Supreme Court of the United States for a writ of certiorari, which was granted on the 22nd day

Libel.

of November, 1948, and which appeal was argued by Leavenworth Colby, Esq., employed in the legal department of the respondent for and on behalf of the respondent in the name of the general agent, Cosmopolitan Shipping Co. Inc.

THIRTY-THIRD: That the petition for a writ of certiorari was urged by the respondent on the major basis that the United States Government was involved and that the ships of the United States Government would be subject to seizure if the judgment of the lower Court was permitted to stand and that the United States Government was primarily interested in the action of Robert A. McAllister v. Cosmopolitan Shipping Co. Inc.

THIRTY-FOURTH: That the decision of the Court of Appeals for the Second Circuit was reversed by the Supreme Court of the United States, the Court stating in substance that the interest of the United States Government was involved in the action.

THIRTY-FIFTH: That the foregoing action taken by the respondent in defending the action by libellant herein against the respondent's general agent, Cosmopolitan Shipping Co. Inc., constituted a course of conduct tantamount to our Government, the respondent herein, availing itself of the opportunity of its day in Court on the merits and defending itself from liability without stating that it was defending in its own name, but in fact defending its own and exclusive interests in the name of its general agent, Cosmopolitan Shipping Co. Inc.

THIRTY-SIXTH: That by reason of the procedure of the respondent herein and its participation in the defense of the action of the libellant herein against the general agent of the respondent herein as aforesaid, the respondent should be estopped from contesting liability on the basis of fault of its officers aboard the aforesaid vessel, which issues

were fully tried in the action against respondent's general agent, as aforesaid.

THIRTY-SEVENTH: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, and that the respondent be required to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libellant's claim.

FOR A SECOND CAUSE OF ACTION:

32

THIRTY-EIGHTH: Libellant repeats and realleges all of the foregoing paragraphs of the libel designated as "First" to "Tenth" inclusive, "Eleventh a" to "Twenty third" inclusive, and "Thirty-seventh", with the same force and effect as if herein set forth at length, and in addition thereto alleges:

THIRTY-NINTH: That during libellant's employment aboard the vessel aforementioned, he was rendered sick, ill and disabled and in need of medical and surgical treatment, nursing care and hospitalization, which the respondent failed to provide in accordance with its obligations.

33

FORTIETH: That the libellant became disabled as heretofore described, but the respondent failed, neglected and refused to supply the libellant with the expenses of his maintenance and cure, all to his damage in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

WHEREFORE, libellant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libellant's claim for damages on the first cause of action in the sum of Five Hundred Thousand (\$500,000.00) Dollars and on the second cause of action in

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Amended Answer.

the sum of Twenty-five Thousand (\$25,000.00) Dollars, together with the costs and disbursements of this action, and that libellant may have such other and further relief as to this Court may seem just and proper.

BERTRAM J. DEMBO,
 Proctor for Libellant,
 Office & P. O. Address,
 220 Broadway,
 Borough of Manhattan,
 City of New York.

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(Original verified.)

Amended Answer.

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

[S A M E T I T L E]

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AS TO THE FIRST ALLEGED CAUSE OF ACTION:

FIRST: Denies each and every allegation contained in Article First, except that respondent admits that Cosmopolitan Shipping Company, Inc., received notice of claim on behalf of the libellant on or about February 5, 1951.

SECOND: Denies each and every allegation contained in Article Second, except as may be provided by applicable law.

THIRD: Admits the allegations contained in Article Third.

Amended Answer.

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FOURTH: Denies each and every allegation contained in Article Fourth, except that it admits that it employed the libellant as a seaman on board the s. s. "Edward B. Haines" during the year 1945.

FIFTH: Denies each and every allegation contained in Article Fifth, except that it admits that it employed the libellant as 2nd Assistant Engineer on said vessel during the year 1945.

SIXTH: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Sixth.

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SEVENTH: Admits the allegations contained in Article Seventh.

EIGHTH: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Eighth.

NINTH: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Ninth.

TENTH: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Tenth.

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ELEVENTH: Denies each and every allegation contained in Article Eleventh, except that it admits there were in force and effect various laws enacted by Congress, applicable to the libellant according to their respective provisions.

ELEVENTH (a). Denies each and every allegation contained in Article Eleventh (a), except such as are of record in the U. S. District Court for the Southern District of New York, the Court of Appeals for the Second Circuit and the Supreme Court of the United States.

TWELFTH: Denies each and every allegation contained in Article Twelfth, except as provided by law.

THIRTEENTH: Admits the allegations contained in Article Thirteenth.

FOURTEENTH: Denies each and every allegation contained in Article Fourteenth, except that it admits the libellant was given a physical examination and passed for employment.

FIFTEENTH: Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Fifteenth.

41 **SIXTEENTH:** Denies each and every allegation contained in Article Sixteenth, except that it alleges that the libellant sailed on the s. s. "Edward B. Haines" from New York on July 31, 1945, for the Fast East; and, after calling at way ports, arrived at Shanghai September 26, 1945; remained there until November 1, 1945, and then made a trip to Hong Kong, returning to Shanghai November 11, 1945; and that the vessel left Shanghai on November 23, 1945, bound for Tsing Tao where it arrived on November 25, 1945, and docked on November 28, 1945, where it remained until departure on December 3, 1945, at 10:50 a. m.

42 **SEVENTEENTH:** Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Seventeenth.

EIGHTEENTH: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Eighteenth.

NINETEENTH: Denies each and every allegation contained in Article Nineteenth, except that respondent admits the libellant was removed to a shore hospital at Tsing Tao upon the vessel's arrival at that port.

TWENTIETH: Denies each and every allegation contained in Article Twentieth, except that it admits that various persons probably came on board the vessel at Shanghai in the routine performance of ship's business.

TWENTY-FIRST: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Twenty-first.

TWENTY-SECOND: Admits the allegations contained in Article Twenty-second.

TWENTY-THIRD: Denies that respondent has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Twenty-third.

TWENTY-FOURTH: Denies each and every allegation contained in Article Twenty-fourth.

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TWENTY-FIFTH: Admits the allegations contained in Article Twenty-fifth, but denies that the meaning of the quoted extracts is complete, as alleged, and alleges that other provisions of said contract qualify the language quoted in the libel.

TWENTY-SIXTH: Denies each and every allegation contained in Article Twenty-sixth.

TWENTY-SEVENTH: Denies each and every allegation contained in Article Twenty-seventh.

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TWENTY-EIGHTH: Denies each and every allegation contained in Article Twenty-eighth.

TWENTY-NINTH: Denies each and every allegation contained in Article Twenty-ninth, except such as are of record in the U. S. District Court for the Southern District of New York, the Court of Appeals for the Second Circuit and the U. S. Supreme Court.

THIRTIETH: Denies each and every allegation contained in Article Thirtieth.

THIRTY-FIRST: Denies each and every allegation contained in Article Thirty-first, except such as are of record in the Court of Appeals for the Second Circuit and except that the Department of Justice collaborated in the preparation of a petition for a writ of certiorari.

THIRTY-SECOND: Denies each and every allegation contained in Article Thirty-second, except such as are of record in the U. S. Supreme Court.

47 **THIRTY-THIRD:** Denies each and every allegation contained in Article Thirty-third, except such as are of record in the U. S. Supreme Court.

THIRTY-FOURTH: Denies each and every allegation contained in Article Thirty-fourth, except such as are of record in the U. S. Supreme Court.

THIRTY-FIFTH: Denies each and every allegation contained in Article Thirty-fifth.

THIRTY-SIXTH: Denies each and every allegation contained in Article Thirty-sixth.

48 **THIRTY-SEVENTH:** Denies each and every allegation contained in Article Thirty-seventh except that respondent denies that it has any knowledge or information sufficient to form a belief as to the jurisdiction of this Honorable Court herein.

AS TO THE SECOND ALLEGED CAUSE OF ACTION:

THIRTY-EIGHTH: Repeats and realleges all of the denials, admissions and allegations hereinbefore set forth with respect to Articles First to Tenth, inclusive, Eleventh (a) to Twenty-third, inclusive, and Thirty-seventh of the libel, with the same force and effect as though the same were set forth herein in full.

THIRTY-NINTH: Denies each and every allegation contained in Article Thirty-ninth, except that respondent admits that libellant during his employment aboard the s. s. "Edward B. Haines" claimed that he was sick, ill and disabled.

FORTIETH: Denies each and every allegation contained in Article Fortieth.

FUTHER ANSWERING the first alleged cause of action, respondent alleges that the facts and circumstances surrounding the illness of the libellant as alleged in the libel were as follows: 50

FORTY-FIRST: On or about July 23, 1945, the libellant signed foreign articles before a representative of the United States Shipping Commissioner at New York, in which he agreed to ship on the s. s. "Edward B. Haines" in the capacity of 2nd Assistant Engineer.

At and during all the times mentioned in the libel, the vessel was in all respects, seaworthy, and properly manned, equipped and supplied with a duly qualified pharmacist's mate on board.

The vessel left New York on or about July 31, 1945, with a cargo consigned to the United States Army at Shanghai, China. She proceeded via the Suez Canal and made calls at Port Said, Colombo, Singapore, Port Swettenham and Hong Kong, arriving at Shanghai on September 26, 1945. The vessel remained in Shanghai, discharging cargo until November 1, 1945, when she left for Hong Kong, returning to Shanghai on November 11, 1945. The libellant went ashore on shore leave at various ports en route, including Hong Kong and Shanghai. At Shanghai, her cargo was discharged, as was customary, by native longshoremen. While at Shanghai, there were loaded on board a number of Army trucks destined for the Chinese Army at Tsing Tao, and about 75 Chinese military truck drivers were taken on board as passengers to handle these trucks upon arrival at desti- 51

nation. There were also a small number of civilian passengers for Tsing Tao taken on board at this port.

The vessel departed from Shanghai on November 23, 1945, for Tsing Tao, arriving there on November 25, 1945, and remained in that port until December 3, 1945, on which date she left on her return voyage to the United States.

On November 24, 1945, while the vessel was at sea en route from Shanghai to Tsing Tao, the libellant for the first time complained to the pharmacist's mate of feeling ill. He was thereupon relieved from duty and instructed to remain in bed where he was given appropriate treatment, as indicated by his expressed symptoms, by the said pharmacist's mate. After arrival at Tsing Tao, the libellant was assisted ashore and conveyed to the U. S. Marine Corps Hospital at Tsing Tao for diagnosis and treatment. After the vessel's departure for the United States, and on December 7, 1945, and while the libellant was a patient in said hospital, his illness was for the first time diagnosed as poliomyelitis. The libellant was flown at once to a United States Navy Hospital Ship at Shanghai for further treatment, and then to the United States Army Hospital at Guam for further treatment, and then transported by ship to the United States Marine Hospital at San Francisco. At his request, the libellant was then flown to the United States Marine Hospital at Staten Island, where he was given proper hospitalization until his voluntary departure from the hospital. From and after the onset of his illness, the respondent provided the libellant with proper nursing and medical care for his disease in the manner and to the extent habitually employed by the medical profession in similar cases.

FURTHER ANSWERING the first alleged cause of action, respondent alleges:

FORTY-SECOND: At the time the libellant entered upon the performance of the employment during the course of which he claims he became sick, ill and disabled, as alleged

Amended Answer.

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in the libel herein, the libellant knew that such employment had certain risks incident thereto and had full knowledge of the possible voyage of the vessel then contemplated⁴ and of his duties as an officer of said vessel, and of the dangers thereof; and whatever sickness or illness was contracted or suffered by him during the course of said employment and which is complained of in the libel herein, arose from and was caused by said obvious risks of the respondent's business or by risks voluntarily taken by the libellant, all of which risks were assumed by the libellant.

FURTHER ANSWERING the first alleged cause of action, respondent alleges:

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FORTY-THIRD: Any sickness or illness incurred or suffered by the libellant at the time and place referred to in the libel herein was caused or contributed to by the negligence and want of care of the libellant and not by any negligence or want of care on the part of the respondent or of anyone for whom it is responsible.

FURTHER ANSWERING the second alleged cause of action, respondent alleges:

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FORTY-FOURTH: That on or about the 16th day of July, 1946, the libellant herein brought a civil action in the District Court of the United States for the Southern District of New York against Cosmopolitan Shipping Company, Inc., which was the General Agent of the respondent under a standard form of General Agency Service Agreement (WSA-GAA, 4-4-42), pursuant to which the s. s. "Edward B. Haines" had been allocated to said Cosmopolitan Shipping Company, Inc., for the voyage described in the libel, for the same cause of action for maintenance and cure as that alleged in the second cause of action of the libel herein and that thereafter, and on or about the 24th day of February, 1948, after a trial before the court and a jury, said de-

feudant duly recovered a judgment dismissing said alleged cause of action for maintenance and cure upon the merits.

FORTY-FIFTH: The libellant thereafter appealed from said judgment of dismissal to the United States Circuit Court of Appeals for the Second Circuit which, on or about the 23rd day of July, 1948, filed its decision affirming said judgment, and a final judgment dismissing the said cause of action was duly entered on the 13th day of August, 1948, in the United States District Court for the Southern District of New York.

FORTY-SIXTH: By reason of the foregoing, said judgment against libellant is *res adjudicata* between the libellant and respondent as to the alleged second cause of action in the within libel and the same is thereby barred herein.

FORTY-SEVENTH: All and singular, the premises are true.

WHEREFORE, respondent prays that the libel herein be dismissed and that it may have such other and further relief as may be proper.

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent,
United States of America,
Gray & Wythe, of Counsel,
Office & P. O. Address,
42 Broadway,
New York 4, N. Y.

(Verified by Horace M. Gray, August 11, 1952.)

Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath. 61

[SAME TITLE]

1. State whether the libellant went ashore at any ports of call of the S. S. "Edward B. Haines" on the voyage described in the libel prior to arrival at Tsingtao.

2. If the answer to the foregoing interrogatory is in the affirmative, state: 62

(a) The names of all such ports at which libellant went ashore;

(b) The number of times the libellant went ashore at each port, respectively;

(c) The approximate periods the libellant remained ashore on each occasion, respectively;

(d) The purpose of each such visit ashore, respectively;

(e) The places and localities visited by the libellant on each such visit ashore, respectively; 63

(f) Whether the libellant was accompanied by any of the vessel's personnel during all or any part of such visits and, if in the affirmative,

(g) The names of such persons as to each such visit, respectively.

3. State whether the libellant had contracted any illness, disease or infection for which he required or received medical attention prior to the second arrival of said vessel at Shanghai on said voyage and, if so, state

64 *Interrogatories Propounded to the Libellant by the
Respondent to be Answered in Writing Under Oath.*

(a) all symptoms experienced, and

(b) treatments received in connection therewith,
respectively, stating

(c) the approximate dates of such symptoms, and

(d) the names of all persons providing such
treatments, respectively.

65 4. State all pathological symptoms, both objective and
subjective, exhibited by the libellant on November 21, 1945,
when he was confined to his bed.

5. State whether the libellant remained confined to his
bed from November 21, 1945, until he was evacuated to the
hospital at Tsingtao; and if the answer is in the negative,
state

(a) on what dates during said period he was not
confined to his bed, and

(b) in what activities he engaged, respectively,
upon each of such days while not confined to his bed.

66 6. State all facts upon which the libellant bases his
allegations in Article 17th of the libel that the master and
chief mate knew of the libellant's alleged illness and alleged
confinement to bed on or on or at November 21, 1945.

7. State on what date it is claimed the master and chief
officer first knew the libellant was ill and confined to his bed
as alleged in Article 17th.

8. State the wording, as nearly as possible, of the
notices alleged in Article 17th and state

(a) where such alleged notices are claimed to
have been posted, and

(b) the approximate date or dates such notices
are alleged to have been posted.

*Interrogatories Propounded to the Libellant by the
Respondent to be Answered in Writing Under Oath.*

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9. State in detail the instructions alleged to have been given the ship's personnel in Article 17th.

10. State all facts upon which the libellant bases his allegations in Article 17th that the master, chief mate and various officers of the vessel knew of the existence of polio ashore, and

(a) where it was known by them to exist during the months of September, October and November, 1945.

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11. State the names and addresses of the doctors claimed in Article 18th to have been available to examine and treat the libellant on or about November 21, 1945.

12. State the location and official designation of the army base alleged to have been within easy reach of the vessel on or about November 21, 1945, as alleged in Article 18th, and

(a) the names and ranks of the doctors, respectively, alleged to have been available to treat libellant.

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13. State the names of the Army and Navy hospital ships alleged in Article 18th to have been in the harbor and

(a) state the name of the harbor in which it is claimed such hospital ships were located.

14. Describe in detail all care and treatment the libellant received on board said vessel between November 20, 1945, and December 1, 1945, and

(a) the names or official capacity of the person or persons who provided such care and treatment.

15. State whether the libellant claims that any of the persons referred to in Article 20th were suffering from

Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath.

poliomyelitis or were carriers of that disease at any of the times mentioned in the libel and, if so, state

(a) the names of such person or persons;

(b) a detailed description of their appearance, respectively, and whether they were stevedores, members of the local armed forces or other persons who were passengers;

(c) whether the libellant had any dealings or contact with any of such persons and, if so, whom, to what extent and for what purpose, respectively;

(d) all facts upon which the libellant bases such claims.

16. Describe in detail the form and character of the toilet facilities built on deck as alleged in Article 21st, stating,

(a) the material used,

(b) approximate dimensions,

(c) methods of use and operation,

(d) their exact location upon the vessel,

(e) whether such facilities were of the type usually and ordinarily employed on the China coast for stevedores and army personnel and, if not,

(f) in what respects they differed from the usual and customary facilities on the China coast at that time,

(g) whether the libellant took part in their construction or operation and, if so,

(h) to what extent.

Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath. 73

17. State the number and describe accurately the location on the vessel of all those toilet facilities alleged in Article 21st to have been permitted to remain unlocked; and state

(a) which, if any thereof, were allocated to the engine room personnel;

(b) which, if any thereof, were allocated to the personal use of the libellant;

(c) to which of such toilet facilities, if any, the libellant had a key. 74

18. State whether the libellant made any protest to the master or any officer of the vessel with respect to the conditions alleged in Article 21st; if so, state

(a) the dates,

(b) places,

(c) names of persons to whom such protest was made, respectively;

(d) circumstances, and

(e) the words or substance of such protest or protests, respectively, and 75

(f) the names of all other persons, if any, present and within hearing of each such protest, respectively.

19. State the number and exact location on the vessel of all drinking fountains claimed in Article 22nd to be common, and state

(a) the type, and

(b) method of operation of each such fountain;

76 *Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath.*

(c) which, if any, of such fountains the libellant used;

(d) whether the libellant could have obtained drinking water on board the vessel by any other means than by the use of such fountains and, if so,

(e) describe all such means in detail.

77 20. State whether the libellant made any protest to the master or any officer of the vessel with respect to permitting any of such drinking fountains to be commonly used and, if so, state

(a) the dates,

(b) places,

(c) names of persons to whom such protest was made, respectively,

(d) circumstances, and

(e) the words or substance of such protest or protests, respectively, and

78 (f) the names of all other persons, if any, present and within hearing of each such protest, respectively.

21. State whether the libellant claims that the Chinese cooks mentioned in Article 23rd prepared any food eaten by the libellant and, if so, state

(a) the approximate date or dates when it is claimed such Chinese cooks first came aboard the vessel;

(b) the description of the food eaten by the libellant claimed to have been prepared by them or either of them, and

(c) the dates of such claimed consumption;

Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath. 79

(d) whether libellant claims either of such cooks were affected with or were carriers of polio and, if so,

(e) all facts upon which libellant bases such claim.

22. State whether the libellant made any protest to the Master or any officer of the vessel with respect to the employment of such cooks and, if so, state

(a) the dates,

80

(b) places,

(c) names of persons to whom such protest was made, respectively,

(d) circumstances, and

(e) the words or substance of such protest or protests, respectively, and

(f) the names of all other persons, if any, present and within hearing of each such protest, respectively.

23. State in what respects and in what manner it is claimed the alleged negligent acts referred to in Article 24th, respectively: 81

(a) caused or contributed to the libellant becoming sick, ill and disabled;

(b) caused his illness to become seriously aggravated.

24. Describe in detail:

(a) the medical aid, nursing care and treatment which the libellant claims should properly have been provided him as alleged in Article 24th, and

82 *Interrogatories Propounded to the Libellant by the
Respondent to be Answered in Writing Under Oath.*

(b) the pathological effects upon the libellant which he claims resulted from the alleged failure of the respondent to provide prompt, adequate and proper medical aid, nursing care and treatment which the libellant claims seriously aggravated the libellant's condition as alleged in Article 24th.

83 25. State in detail in what manner the libellant claims he was "otherwise" carelessly, recklessly and negligently treated as alleged in Article 24th, and state _____

(a) in what manner, and

(b) to what extent the libellant claims such alleged treatment, respectively, resulted in his suffering severe, painful and permanent illness and disability.

84 26. Describe in detail all libellant's disabilities and sequelae, if any, which libellant claims are now existing and which he claims resulted from the respondent's alleged failure to provide him with proper medical aid and treatment and nursing care and hospitalization.

27. State whether the libellant has been employed since November 30, 1945, and, if the answer is in the affirmative, state

(a) the names and addresses of all such employers;

(b) the dates between which the libellant was so employed, respectively;

(c) the type and character of such employment, respectively, and

(d) the wages or remuneration paid the libellant by each such employer, respectively, by the hour, day, week, month or otherwise as the case may be.

Interrogatories Propounded to the Libellant by the Respondent to be Answered in Writing Under Oath. 85

28. State in detail

(a) the places where, and

(b) the periods during which the libellant received medical and surgical treatment, nursing care and hospitalization from November 20, 1945, to date;

(c) a complete description of all medical and surgical treatment, nursing care and hospitalization received by the libellant at each such place and during each such period, respectively, and 86

(d) the sums, if any, expended or charges incurred by the libellant at each such place and during each such period, respectively, for such medical and surgical treatment, nursing care and hospitalization, respectively.

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United States of America,

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Libellant's Answers to Interrogatories.

[S A M E T I T L E]

Libellant answering the interrogatories propounded by the respondent, states and alleges as follows:

1. Yes.

2. (a) Shanghai, China; Colombo, Ceylon.

89 (b) Several times at Shanghai and once at Colombo.

(c) A few hours each time.

(d) Sightseeing.

(e) Various stores, movies and restaurants.

(f) Libellant was accompanied on several occasions by other personnel of the vessel.

(g) Deck engineer, Fred A. Bentz, Army Lieut. William Cook at Shanghai; once with Fred A. Bentz at Colombo and several times with Lieut. Cook.

90 3. Libellant first felt ill about the 11th of November, 1945.

(a) Stiffness of the neck, blurred vision, weakness, dizziness, difficulty in swallowing and pain primarily in the back of the neck at the base of the head.

(b) Received no treatment.

(c) The symptoms continued and increased from the 11th of November, 1945.

(d) No one administered treatment.

4. In addition to the symptoms described in the previous paragraph, libellant was unable to eat, move and felt nauseous, stiff and painful throughout the body on November 21, 1945.

5. Yes.

(a) Was confined continuously to bed.

(b) Was confined to bed and did not engage in any activities.

6. The chief mate, the first assistant and the purser spoke about a doctor, advising libellant about eight or nine days before libellant was removed from the ship. In view of the master's testimony in his deposition, master was advised by the purser that libellant was ill as soon as the purser found out about it.

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7. November 11, 1945.

8. (a) the notices were posted throughout the ship, including the messrooms, purser's office and at the slop chest.

(b) Throughout the Far East voyage.

9. The instructions were in the nature of a general warning against the presence of contagious diseases, including polio.

10. The master, in his deposition taken August 14, 1952 admitted that he knew of the presence of polio and that he advised the chief mate and all other officers of its presence at the various ports that the ship visited in the Far East.

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(a) The master admitted that he knew of the existence of said disease during the voyage in question.

11. Libellant does not know the names and home or office addresses of the doctors who were available to examine him. That the respondent is in possession of the names and addresses of said doctors in view of the fact that they were Army and Navy vessels, including hospital ships and hospital stations, dispensaries and clinics at and about all the ports that the vessel visited during the voyage in question.

Libellant's Answers to Interrogatories.

12. U. S. Marine Corps Hospital, Tsingtao, China, Hospital ship "Repose" at Shanghai, China.

(a) Libellant does not know the names of the doctors nor their rank.

13. See paragraph 12th.

14. Bicarbonate of soda and some juices consisted of the entire treatment.

(a) First assistant engineer.

15. (a) Libellant does not know.

(b) Chinese army personnel including Chinese military men were permitted aboard the vessel at Shanghai, China. The master testified that the number was approximately fifty and no less than forty. That in addition, there were Chinese truck drivers and civilian employees numbering approximately twenty-five, that amongst the twenty-five, there were several mechanics.

(c) All of these men had unrestrained freedom of the vessel and used all the parts of the vessel indiscriminately and without any restraint.

(d) These men coming from a known area of contagion constituted carriers in whole and in part.

16. (a) Lumber.

(b) Carpenters came aboard and built a wooden toilet on the deck, sort of a trough affair. It was a wooden shed and had a trough where the men could sit, and it led over the side of the ship and was hosed by the seaman. That is where the feces went, through the open and right down into the water. Those were the facilities provided for 250 odd people; 125 were with us on the trip that actually stayed aboard the ship going to Tsingtao.

(c, d and e) Same as above.

(f) Libellant does not know facilities on other ships.

(g) No.

(h) Libellant had charge of all water pumps and some of the water may have been used to pump the toilets aforementioned.

17. All the toilet facilities for use by the crew were unlocked.

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(a) Including the engine room personnel.

(b) Libellant had the use of the officers' toilet facilities as well as the crew members.

(c) No key was provided as all the toilets were left open.

18. Libellant, as well as all the other personnel of the vessel complained to their individual superiors and to other officers in a general manner as to the conditions but libellant does not remember a specific protest to any particular personnel on a particular date at a particular time at a particular place.

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19. One drinking fountain was used in common.

(a) It was an open fountain.

(b) Manual operation.

(c) The only one available.

(d) Water could have been obtained by going to other parts of the vessel.

(e) Water could have been obtained in the messrooms.

20. The complaints were general, the same as complaints about the toilet facilities set forth in the 18th answer.

Libellant's Answers to Interrogatories.

21. Libellant does not know.

22. No.

23. (a) Unduly exposed the libellant to contagion.

(b) The failure to treat caused and permitted the virus to become active and progressive.

101 24. (a) Libellant's condition should have been properly diagnosed by a person adequately trained to diagnose his illness. The master should have personally examined the libellant and not relied on the purser's statement that libellant was "another venereal case" without taking the trouble of finding out for himself. If the ship's officers and personnel were not adequately trained or were without the knowledge to make an accurate and proper diagnosis, they were under a duty to procure doctors aboard the vessel or bring libellant to facilities where doctors could have been provided so as to make a correct and proper diagnosis and the ship's officers and personnel were not justified in relying on their own unskilled and inadequate knowledge in treating with a man's life and health when they did not know what the man was suffering from. Libellant should
102 have been removed from the ship and taken to a place where he could have received proper food, medication, nursing care and medical treatment.

(b) Libellant's condition was weakened, the virus was caused to become active and progressive, the illness became worse, the effects thereof became more severe, the disease was not checked in time, which, if treated promptly and in accordance with established good medical practice, would have prevented libellant from being the victim of permanent defects and disabilities.

25. (a) In that libellant was completely ignored and neglected.

Libellant's Answers to Interrogatories.

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(b) Libellant's resistance was lowered, the effects of the disease were caused to become extensive and libellant's condition became such that permanent disabilities resulted which could have been prevented by prompt, adequate and proper hospitalization, nursing care and medical treatment by competent persons under medical supervision.

26. Libellant suffered paralysis and impairment and loss of use of both lower extremities and the left upper extremity as well as general weakness; pain throughout the body, including head; dizziness; weakness and insomnia. Libellant has lost his physical strength to a great extent and his power to engage in his former social and economic activities, severe shock and organic damage to his central nervous system which is of a permanent nature.

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27. Yes.

(a and b) Whale Oil Company, Brooklyn 32, New York. From October, 1949 to March, 1950. Thereafter, the City of New York, Department of Welfare from April 10, 1950 to October 14, 1950. U. S. Army, Quartermaster Corps, 111 East 16th Street, New York, N. Y. from November 2, 1950 to June 6, 1952. Gibbs & Cox, Inc., 21 West Street, New York, N. Y. from June 9, 1952 to present date.

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(c) Clerical.

(d) Wages went from \$35.00 minimum to \$62.50 maximum per week.

28. (a, b and c) Libellant was removed from the vessel and taken to the U. S. Division Field Hospital, No. 1, 6th Medical Battalion, by means of two men assisting him down the gangplank and then walking him for some distance including fifteen steps and then he was removed by ambulance, consisting of a converted jeep. Libellant walked

Libellant's Answers to Interrogatories.

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from the jeep to the hospital with the assistance of some people. He was put to bed in the hospital; was given an examination, including a spinal tap; was given a hot water bottle at the base of the spine; hospitalized for about seven days. Libellant was removed from the hospital by stretcher and taken to Shanghai. At Shanghai, libellant was placed aboard the hospital ship, U. S. S. "Repose," where he remained as a patient from December 7, 1945 to December 18, 1945. While libellant was aboard the aforesaid vessel, he was placed in isolation where, for the first time, an attempt was made to supply some food which libellant could eat. By that time, libellant was too weak to eat and he had to be fed intravenously. Libellant's legs were mobilized, while aboard the U. S. S. "Repose," with the use of splints. Sand bags were used to keep the legs straight. Libellant had received penicillin at Tsingtao. From Shanghai, libellant was flown to Guam where he remained for approximately one week leaving on or about January 1, 1946. Libellant left Shanghai approximately December 18, 1945. From Guam, libellant went to San Francisco, California by U. S. Navy vessel. The trip took seventeen days and there was no treatment aboard the vessel. The doctor who had been assigned to take care of libellant was ill himself and could not take care of libellant. Libellant entered the U. S. Marine Hospital at San Francisco where the Sister Kenny treatment was started. While in the U. S. Marine Hospital, San Francisco, libellant was confined to his bed all of the time with the exception of one effort to get up. Libellant was transferred from the U. S. Marine Hosp. at San Francisco, California to the U. S. Marine Hospital at Stapleton, Staten Island, arriving on April 21, 1946 and remaining there as an inpatient until May 9, 1946 where the Sister Kenny treatment was continued for damage to the central nervous system.

(d) Libellant has not been billed for any treatment. After the U. S. Marine Hospital, Stapleton, Staten Island,

Libellant's Answers to Interrogatories.

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libellant was then treated by Dr. George Deaver of Bellevue Hospital, New York City, and then placed under rehabilitation services of the City and State of New York.

Dated, New York, September 22, 1952.

Yours, etc.,

BERTRAM J. DEMBO,
Proctor for Libellant,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

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To:

FRANK J. PARKER, Esq.,
United States Attorney,
Proctor for Respondent.

GRAY & WYTHER, Esqs.,
of Counsel,
42 Broadway,
New York, New York.

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(Verified by Robert A. McAllister, Sept. 22, 1952.)

112 **Libellant's Further Answers to Interrogatories.**

[S A M E T I T L E]

Further answering the interrogatories propounded by the respondent, libellant states and alleges as follows:

6. On or about the 11th day of November, 1945, the master and chief mate were informed by various persons, including the first assistant engineer and the purser, that the libellant was ill and confined to his bed.

15. The libellant claims that the persons referred to in Article 20 were suffering from poliomyelitis and were carriers of that disease at all of the time mentioned in the libel.

(c) Libellant will claim that he had contact with such persons as they had freedom of movement over the entire vessel and came in close proximity with the vessel, but the libellant does not know the name, to what extent, the date, and under what circumstance such contact took place other than the fact that said persons were all aboard the vessel using all the facilities of the vessel without restraint which the libellant was required to use.

(d) Libellant bases such claims, to wit, that the aforementioned persons were carriers of the disease and were in a position to and did spread the disease to the libellant by reason of the fact that they were permitted free access to and about the vessel and unrestrained use of all the facilities and appurtenances aboard the vessel, including toilet facilities and drinking fountain.

16. (d) The toilet facilities were located on the main deck, midship, with the open chute or conduit extending from the center of the ship over the right side, to the best of libellant's recollection.

Libellant's Further Answers to Interrogatories.

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19. Libellant does not remember the exact location of the fountain, except recalls that it was on the main deck near the passageway, approximately near the center of the ship.

20. Libellant did not make any protests to the master or any officer of the vessel with respect to permitting drinking fountains to be used in common by people coming from shore.

Dated, Brooklyn, New York, November 5, 1952.

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Yours, etc.,

BERTRAM J. DEMBO,
Proctor for Libellant,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

To:

FRANK J. PARKER, Esq.,
United States Attorney,
Proctor for Respondent.

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GRAY & WYTHE, Esqs.,
Of Counsel,
42 Broadway,
New York, N. Y.

(Verified by Bertram J. Dembo, Nov. 5, 1952.)

118 **Interrogatories Propounded to the Respondent by the
Libellant to be Answered in Writing Under
Oath.**

[S A M E T I T L E]

1. What type of vessel was the S. S. "Edward B. Haines"?

2. Set forth its size and tonnage.

119 3. What constituted the full personnel of the vessel as to (a) officers; (b) crew.

4. Set forth the name and capacity of each officer and crew member.

5. Where was the vessel on November 24, 1945?

6. Set forth the vessel's itinerary, including each and every port of call and the hours of arrival and departure at each port during the months of October and November, 1945.

120 7. During the month of November, 1945, did you (a) own the vessel; (b) operate the vessel; (c) employ all the officers and members of the crew aboard said vessel?

8. Was the libellant in your employ aboard the afore-said vessel during the month of November, 1945? If so, state (a) when he joined the vessel; (b) in what capacity; (c) at what salary; (d) when he left the vessel; (e) under what circumstances.

9. Did you know that McAllister was sick during the month of November, 1945? Is so, state (a) through what source you obtained such information; (b) did your master have any information that the libellant was ill; (c) did the

*Interrogatories Propounded to the Respondent by the
Libellant to be Answered in Writing Under Oath.*

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purser have any knowledge or information that the libellant was ill; (d) did any person employed aboard the aforesaid vessel know that the libellant was ill.

10. If you or any of your employees aboard the vessel aforesaid knew that the libellant was ill, state (a) when you or one of your officers or crew members first knew about said illness; (b) when each and every such person had knowledge or reports of said illness; (c) the nature of such illness; (d) what report, if any, was received about said illness; (e) when such report was received; (f) where such report was received; (g) from whom this information or report was obtained; (h) to whom such information or report was given.

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11. State whether or not you or any of your officers or employees conducted any physical, medical or other professional examination of the libellant during his employment aboard the aforesaid vessel. If you did so, state (a) when; (b) where; (c) by whom; (d) the nature of such examination.

12. If no examination was made of the libellant, state whether the failure to make such examination was by reason of the fact that you did not know that the libellant was sick, or by reason of the fact that you thought you could do it through the personnel employed aboard the ship without the need of outside assistance.

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13. State who, if anyone, called for any assistance from without the vessel, giving (a) name; (b) rank; (c) the date of any such request; (d) where such request was made; (e) of whom such request was made.

14. State what, if any, assistance or maintenance and cure was given to the libellant while he was in your employ, either aboard the aforesaid vessel or after he left the vessel and before he went into a United States Marine Hospital.

124 *Interrogatories Propounded to the Respondent by the Libellant to be Answered in Writing Under Oath.*

15. State whether you, your master, officers or any personnel of the vessel ever diagnosed the libellant's condition or made any attempt to do so. If so, state (a) who made such diagnosis; (b) when such diagnosis was made; (c) where such diagnosis was made; (d) the nature of such diagnosis.

125 16. State what treatment, if any, was rendered by you, your master, officers or members of the crew to the libellant, setting forth (a) who rendered treatment; (b) when treatment was rendered; (c) where treatment was rendered; (d) the nature of such treatment.

17. State whether or not the purser of the vessel in words or in substance made a statement that the libellant was suffering with a venereal disease at any time while the libellant was employed aboard the aforesaid vessel. If so, state (a) when such statement was made; (b) where such statement was made; (c) to whom such statement was made.

126 18. State whether in fact or in substance, the master stated that he would not visit the libellant because libellant was suffering from a venereal disease. If so, state (a) when such statement was made; (b) where such statement was made; (c) to whom such statement was made; (d) the substance of such statement.

19. State what drugs you had aboard the aforesaid vessel.

20. State what facilities were available to (a) remove the libellant from the vessel; (b) transport him to a medical facility.

21. State the nature of the medical facility.

22. State the location of the medical facility.

23. Did you, your master or any officer employed aboard the vessel at any time visit the libellant while he was con-

Interrogatories Propounded to the Respondent by the Libellant to be Answered in Writing Under Oath. 127

fined to his quarters? If so, state (a) when such visit or visits were made; (b) who was present during such visit or visits; (c) the number of visits made.

24. Describe the condition of McAllister during this visit or visits.

25. When was libellant last on duty, setting forth the date and hours of his watch.

26. Set forth the duties assigned to libellant during the first two weeks of November, 1945, giving the duties day by day. 128

27. State which duties were actually performed, giving the days and hours during which the duties were actually performed.

28. State under whose immediate supervision libellant was working during the first two weeks of November, 1945.

29. State when libellant was first confined to his quarters and what efforts, if any, were made to ascertain the reason for his confinement. 129

30. State when libellant last reported for duty, and if any effort was made to find out why he was not reporting thereafter. If such inquiry was made, set forth (a) the nature of such inquiry; (b) the information ascertained by such inquiry; (c) if any record was made thereof; (d) if a record was made, set forth a copy thereof.

31. Set forth the name and last known address of each and every person which the respondent and/or its proctors claims now or will claim at the trial has any pertinent knowledge concerning the libellant, his illness or any phase of the subject matter of this action.

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Answers to Interrogatories.

32. Itemize and set forth in detail the substance of such information.

BERTRAM J. DEMBO,
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220 Broadway,
Borough of Manhattan,
City of New York.

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Answers to Interrogatories.

[S A M E T I T L E]

Respondent in answer to the libellant's interrogatories heretofore propounded to it, states upon information and belief as follows:

1. Liberty ship, Type EC 2-S-C1.

2. Net tonnage approximately 4,380; length approximately 441 feet; beam approximately 56 feet.

3 and 4. See shipping articles.

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5. At sea, en route from Shanghai to Tsingtao, China.

6. Arrived Shanghai, 8:45 p. m., September 26, 1945, and departed 3:22 p. m., November 1, 1945; arrived Hong Kong November 5, 1945, 1:15 p. m., departed 7:32 a. m., November 7, 1945; arrived Shanghai 9:00 p. m., November 11, 1945, departed 10:40 a. m., November 23, 1945; arrived Tsingtao 10:30 a. m., November 25, 1945, departed 10:50 a. m., December 3, 1945.

7. (a) Yes; (b) Yes; (c) Yes.

8. Yes; (a) signed on July 23, 1945; (b) Second Assistant Engineer; (c) \$220 per month; (d) December 1, 1945,

(e) removed to U. S. Marine Corps Division Field Hospital No. 1, Tsingtao, China, for medical observation.

9. No. (a) libellant reported to Pharmacist's Mate that he commenced to feel dizzy on November 24, 1945; (b) see deposition of Master taken August 14, 1952; (c) Pharmacist's Mate believed the libellant was ill when he was evacuated to the hospital at Tsingtao; (d) respondent does not know.

10. Respondent does not know whether any employee aboard the vessel knew that libellant was ill, except respondent states that the libellant reported to the Purser that he commenced to feel dizzy on November 24, 1945.

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11. No professional medical examination was made of the libellant until November 30, 1945, when a Lt. Cmdr. D. J. Giorgio, U. S. N. M. C., came on board for that purpose.

12. The medical examination and removal of libellant from the ship to a hospital was arranged promptly upon a determination that the libellant's reported physical condition warranted such action.

13. Patrick E. Napier, Pharmacist's Mate arranged on November 30, 1945, with Lt. Cmdr. D. J. Giorgio, U. S. N. M. C., for the examination of the libellant and for his removal to Division Field Hospital No. 1, 6th Marine Division, Tsingtao, China.

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14. While on the vessel, the libellant was under the supervision of the Pharmacist's Mate who furnished him with proper care and attention according to his then condition. The libellant was not required to perform any duties and remained in his bed. He was furnished with proper nursing and medical care and attention while he was a patient at the United States Marine Corps Field Hospital in Tsingtao, while on the U. S. S. "Repose" and while at the U. S.

Answers to Interrogatories.

Navy Hospital at Guam and in the various U. S. Public Health Service Hospitals where he was treated.

15. Personnel of the vessel did not diagnose the libellant's condition. Diagnosis was not determined until December 11, 1945, while libellant was a patient on the U. S. S. "Repose."

16. While on board the vessel, the libellant received adequate and proper care and attention from the Pharmacist's Mate and was given complete rest.

137 17. Respondent does not know.

18. The Master did not make such a statement in fact or substance.

19. Respondent does not know.

20. (a) Respondent does not know; (b) U. S. Marine Corps Ambulance.

21, 22. Respondent cannot answer these interrogatories because they are indefinite.

23. The Pharmacist's Mate visited libellant while he was confined to his quarters.

138 24. Resting.

25. November 26, 1945, from 0000 to 0800.

26. The libellant performed the usual duties of Second Assistant Engineer in port and, while vessel was under way, stood the 0000-0400 and the 1200-1600 watches in the engine room.

27. Libellant performed all his duties as Second Assistant Engineer through November 26, 1945, at 0800 hours.

28. Halvor O. Mjoen, Chief Engineer.

29. Some time after 0800 on November 26, 1945, but respondent does not know the exact date and time. The

Pharmacist's Mate inquired of the libellant and the libellant remained under the care and attention of the Pharmacist's Mate.

30. Libellant stood the night engineer's watch, from 0000 to 0800 on November 26, 1945. Thereafter, the libellant told the Pharmacist's Mate he did not feel well. At the time of his discharge from the vessel, the libellant complained of having no appetite, of dizziness, of inability to hold food on his stomach and of being weak, as shown on Report of Illness prepared by Pharmacist's Mate, a true photostatic copy of which is attached hereto. (Report of Illness printed p. 416, *post*, as Respondent's Exhibit D.)

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31, 32. The various witnesses to be called by the respondent will be produced at the trial.

Dated, New York, N. Y., January 7, 1953.

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent,
United States of America,

GRAY & WYTHER,
of Counsel,
Office & P. O. Address,
42 Broadway,
New York 4, N. Y.

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To:

BERTRAM J. DEMBO, Esq.,
Proctor for Libellant,
220 Broadway,
New York 7, N. Y.

(Verified by Horace M. Gray, Jan. 7, 1953.)

Testimony.

[S A M E T I T L E]

Brooklyn, New York,
January 12, 1953.

Before—HONORABLE ROBERT A. INCH, U. S. D. J.

APPEARANCES:

143 BERTRAM J. DEMBO, Esq., Proctor for Libellant, by JACOB
 RASSNER, Esq., Advocate.

FRANK J. PARKER, Esq., United States Attorney, Eastern
District of New York, Proctor for Respondent, United
States of America, by MESSRS. GRAY & WYTHE, Proctors
for Respondent, by HORACE M. GRAY, Esq., and EDWARD
R. PHILLIPS, Esq., Advocates.

The Court: All right, gentlemen.

Mr. Gray: Just a minute. I have some motions.

144 Mr. Rassner: All right.

Mr. Gray: I ask that the libellant be required to state on
the record his answers to the requests for admission of
facts which were served on him on or about the 5th instant,
and I hand this up to the Court (producing papers).

Mr. Rassner: I object to that until we have disposed
of the interrogatories propounded by the libellant, which
the respondent was directed to serve when his exceptions
were overruled, before we proceed with any—

The Court: Hasn't he done that?

Mr. Rassner: No. They have served us with certain
answers and refused to answer other questions although
they were directed to do so.

Mr. Gray: Your Honor, my friend is dead wrong.

Mr. Rassner: Well, let's read them.

Mr. Gray: Just a minute. I have a right to tell the Court what the situation is here.

Some eight or nine months ago Mr. Rassner served me with some interrogatories. They were the most unique and peculiar interrogatories I have ever run into in my experience at the admiralty bar.

Mr. Rassner: Thank you, Mr. Gray.

Mr. Gray: I excepted to them, and he never brought my exceptions on for argument, but a month ago he agreed to withdraw all those interrogatories if I would permit him to file substituted interrogatories. I agreed to that. His old interrogatories were withdrawn. The substituted ones were served on me a month or so ago, and I have served him with answers to those interrogatories.

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Now I want to call your Honor's attention also to something else here.

If your Honor will look at the complaint you will find that—bearing in mind that this is a suit for negligence—

The Court: Yes.

Mr. Gray: Your Honor will find that the libelant has attempted to set up a claim for *res judicata*,—

The Court: Yes.

Mr. Gray: —to enforce the old jury verdict against the Cosmopolitan Shipping Company, against the United States of America.

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I filed exceptions to the libel, and the exceptions were brought on before Judge Abruzzo and Judge Abruzzo, after considering the exceptions for a while wrote an opinion in which he said:

"I must confess the libel is a bit confusing. I glean from this libel it is one of negligence. The libelant has used a circuitory route to allege a cause of negligence. In view of the seriousness of the injury, I dislike dismissing the libel on the papers. That should be reserved for the trial court where a decision can be made with findings of fact and conclusions of law. The respondent is amply protected by the past record of this case. I seriously doubt the ability of a recovery here in a trial court."

Testimony.

Now, Judge Abruzzo has in effect referred the exceptions to your Honor, and I also wish to press my exceptions to the complaint as it now stands, and insist that it be amended so that when you hear this case it will be tried on a clear-cut set of issues.

If your Honor will look through the libel you will immediately see why I take the position—

Mr. Rassner: I agree with you that—

Mr. Gray: Wait a minute.

149 Mr. Rassner: Just a moment. Will you let me agree with you a moment? I think I will save you some time.

We have sued on the basis of *res judicata*. I intend to make my motion, and I expect the Court to overrule my motion and deny it, but I would like to have it as part of my record, because, as I have stated before, the Courts have held that it is *res judicata* when in favor of the government, but it is not *res judicata* when it is in favor of the libelant, but I would like to make my motion.

150 I have drawn my pleadings so as to set forth a cause of action on *res judicata*, but I expect the Court to deny that motion, but I intend to make my motion for the record. I expect, of course, a denial, because the law is that way today. Any change of that would have to come from a higher court. But then, after that takes place, I have an adequate allegation in negligence under the Jones Act.

I expect to proceed to prove, and try, the case.

I have just a simple negligence action under the Jones Act.

The Court: What was the cause of action that took place before Judge Cox?

Mr. Rassner: Negligence.

The Court: Negligence?

Mr. Rassner: Yes, but we alleged the relationship of employer and employee with *pro hac* rights, and the United States Supreme Court stated that that relationship of employer and employee did not exist, and unless that did exist in fact an action under the Jones Act would not lie,

and that the agent was not responsible for the torts committed by seamen aboard the ship. They were not the employees of the agent. They were the employees of the government.

Mr. Gray: Well, if your Honor please, my friend brought suit in the Southern District for *res judicata* on the Cosmopolitan Shipping Company verdict, and we appeared specially and excepted to the libel on the ground that it did not state a cause of action, and Judge Dewey dismissed their libel in the Southern District, so that they have raised the issue of *res judicata*. They appealed to the Circuit Court of Appeals, and they did not press their appeal before the Circuit Court of Appeals. So this is just a smoke screen before your Honor.

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Judge Dewey's opinion is attached to the memorandum which I have handed to your Honor.

I think, before we get into the trial—

The Court: Why shouldn't we simplify this thing as far as we can by my statement that I am going to allow you to show me any evidence that you think would have affected the decision in the first trial. Why couldn't I do that?

You don't like that?

Mr. Gray: No, I don't like that.

The Court: What do you want? You want—

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Mr. Gray: I want a trial.

The Court: A real trial?

Mr. Gray: A real trial. Yes, sir. An honest to goodness trial.

The Court: What would that consist of? Putting the man on the stand?

Mr. Gray: Putting their witnesses on the stand and trying the case like any other negligence case is tried.

The Court: How long would that take?

Mr. Gray: Well, Mr. Rassner told me that he thought he could finish his case by some time tomorrow morning.

Mr. Rassner: Will you stipulate the medical?

Mr. Gray: No, not by any means. Your medical—your doctor—

Testimony.

Mr. Rassner: Will you stipulate any of the witness's testimony except those that I have here?

Mr. Gray: We have already gone through that.

He has asked me to stipulate, and I told him I could not—

Mr. Rassner: The answer is yes or no.

Mr. Gray: No.

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The Court: Can't we eliminate a lot of this shadow-boxing by simply letting him put the man on the stand and testify to what he did as on the first trial, and then a good deal of the other evidence would come in, and the government would put in what you think should be put in, or what you have learned now might change the verdict, and avoid all this smoke-screen of motions, and so forth, and exceptions. Why not go ahead and try it that way?

Mr. Gray: All right, I am ready.

Mr. Rassner: May I move—

Mr. Gray: Just a minute. I have another motion to make.

First of all I ask that these requests for admissions of facts be filed, your Honor.

The Court: Have you had a pretrial, or something?

Mr. Rassner: No.

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The Court: What are the admissions? Have you made them?

Mr. Rassner: I want to go into the interrogatories first.

The Court: What do you say about the trial?

Mr. Rassner: I am ready.

To simplify the matter I will withdraw all allegations in the libel, with the exception of the following—and may I dictate it on the record—one paragraph on negligence, upon which I rely?

The Court: Yes.

Mr. Rassner: May I do that?

The Court: Yes. In other words, that takes out res judicata and all that kind of stuff?

Mr. Rassner: Everything.

Testimony.

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The paragraph is as follows:

"That at all times set forth in the libel Robert A. McAllister was a seaman in the employ of the Respondent, the United States of America.

That on or about the 11th day of November, 1945, the Libellant took sick while in the employ and in the service of said vessel.

That his illness was called to the attention, on or about the 11th day of November, 1945, of various persons and personnel of the vessel.

That by the 24th of November, 1945, the Purser had actual knowledge of the fact that the Libellant was ill and disabled.

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That Mr. McAllister received no treatment, no adequate food, and no medication at all while on the vessel after his illness and after the vessel was put on notice of his illness.

That as a result of such failure to treat the Libellant's condition was aggravated to the extent that he is now suffering with permanent disabilities which would have been avoided had he received prompt, adequate, and proper medical aid and attendance.

And that, your Honor, will be the basis of my cause of action."

The Court: All right.

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Mr. Gray: And that is denied.

The Court: That is denied?

Mr. Gray: Yes, sir.

Now, if your Honor please, does that mean that the complaint in this action, the libel in this action, as filed, is withdrawn, and we are only trying the case on this allegation?

The Court: I consider that the new complaint, and under the circumstances that is the issue that will be presented to be decided by me; as to whether there was negligence.

Now, I suppose, by way of a word of caution, although I don't need to caution either of you, because you are

Testimony.

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experienced counsel, I ought to say in connection with all of this that we are doing now, that if we have a trial it will be subject to all the objections and exceptions and remarks that could be made on the ground that perhaps my method is wrong, and that I should have done this or should have done that.

I am going to retry the case on the new complaint.

I will allow Mr. Rassner to put his client on the stand, the same as if he never brought the action before, and I will allow the witnesses to come in. I will allow you to put on whatever witnesses you think necessary.

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If there are, without prejudice to the trial, certain facts that you two can agree on, from the first trial, those could come in, not as reference to the record, but as a stipulation of facts.

Mr. Gray: Certainly.

The Court: Is that all right?

Mr. Gray: Certainly, your Honor.

The Court: In that way both counsel will shorten the trial.

Mr. Rassner: Yes, I think we can do that.

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The Court: But the whole thing is understood to be under an exception both way—that is, to both parties. You may have your reasons and Mr. Rassner may have his, but I think we make a better record that way.

Mr. Rassner: Yes, sir.

Mr. Gray: Now, with the consent of Mr. Rassner the last paragraph of Article 41 of the Answer, the amended answer already filed in this case, is amended to read as follows:

On November 24, 1945, while the vessel was at sea, en route from Shanghai to Tsingtao the libellant for the first time felt dizzy, which condition continued for four days. He continued to perform his duties through the first watch on November 26th and thereafter rested in his bunk, where he was visited from time to time by the Pharmacist's Mate. After arrival at Tsingtao the libellant was examined

Testimony.

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by a United States Navy doctor, and on December 1, 1945, was assisted ashore and conveyed by ambulance to the United States Marine Corps Hospital at Tsingtao for diagnosis.

After the vessel's departure for the United States, and on December 7, 1945, the libelant was flown to Shanghai, where he was hospitalized on the United States Navy Hospital Ship Repose, where his illness was for the first time diagnosed on December 11, 1945, as poliomyelitis.

The libelant was then flown from the United States Navy Hospital to Guam for further treatment, and then transported by ship to the United States Marines Hospital at San Francisco.

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At his request the libelant was then flown to the United States Marine Hospital at Staten Island, where he was given proper hospitalization until his voluntary departure from the hospital.

From and after the onset of his illness the respondent provided the libelant with proper nursing and medical care for his disease in the manner and to the extent habitually employed by the medical profession in similar cases.

The Court: All right?

Mr. Rassner: Without conceding, of course, the truth of any of the allegations of fact, I consent to the amendment.

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The Court: All right.

It is understood that the offer of the record in the first trial, first made by Mr. Rassner, was withdrawn.

Mr. Gray: Yes, sir.

The Court: And I therefore consider that that record is not a part of this case.

Mr. Rassner: Yes.

The Court: Except as you agree on it with regard to certain facts.

Mr. Rassner: Yes, your Honor.

The Court: Is that correct?

Mr. Rassner: Yes, your Honor.

Testimony.

Mr. Gray: Yes.

The Court: Very well.

Mr. Rassner: I would like to read into the record certain answers to interrogatories, and ask for certain answers which have not been made, and ask counsel to make them on the record.

"1. What type of vessel was the S. S. Edward B. Haines?"

The answer to No. 1 is, "1. Liberty Ship, type EC-2-S-C-1."

167 Mr. Gray: I have the answers to the interrogatories, which may be handed right to his Honor.

Mr. Rassner: Well, I would like to read those which I want, and not those which I don't want.

The Court: Read into the record those which you want.

Mr. Rassner: Yes, sir.

(Reading) "2. Set forth its size and tonnage.

"2. Net tonnage approximately 4380; length approximately 441 feet; beam approximately 56 feet.

"3. What constituted the full personnel of the vessel as to (a) officers; (b) crew."

Now, that has not been answered and the answers to interrogatories says: "3 and 4. See shipping articles."

168 Mr. Gray: We have the shipping articles here, which we will offer in evidence.

Mr. Rassner: May I have them? I want to offer them in evidence now.

Mr. Gray: This is a photostatic copy (producing papers).

Mr. Rassner: That is all right.

(Discussion off the record.)

Mr. Rassner: Your Honor, is it all right to have the doctor here at 2:00 o'clock?

(Discussion off the record.)

The Court: It will have to be tomorrow.

Mr. Rassner: Is tomorrow all right?

(Discussion off the record.)

Testimony.

The Court: You may bring the doctor in tomorrow.

Mr. Rassner: 2 o'clock tomorrow?

The Court: Yes.

Mr. Gray: A photostatic copy of the shipping articles has been produced.

Mr. Rassner: I offer them in evidence.

Mr. Gray: No objection.

(Photostatic copy of shipping articles marked Libellant's Exhibit No. 1.)

Mr. Rassner: Then I go to No. 5.

(Reading) "5. Where was the vessel on November 24, 1945?

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"5. At sea, en route from Shanghai to Tsingtao, China.

"6. Set forth the vessel's itinerary, including each and every port of call and the hours of arrival and departure at each port during the months of October and November, 1945.

"Arrived at Shanghai, 8:45 p.m., September 26, 1945, and departed 3:22 p.m., November 1, 1945; arrived at Hong Kong November 5, 1945, 1:15 p.m., departed 7:32 a.m., November 7, 1945; arrived Shanghai, 9:00 p.m., November 11, 1945, departed 10:40 a.m., November 23, 1945; arrived Tsingtao 10:30 a.m., November 25, 1945, departed 10:50 a.m., December 3, 1945.

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"7. During the month of November, 1945, did you (a) own the vessel; (b) operate the vessel; (c) employ all the officers and members of the crew aboard said vessel?

"7. (a) Yes; (b) Yes; (c) Yes.

"8. Was the libellant in your employ aboard the afore-said vessel during the month of November, 1945? If so, state (a) when he joined the vessel; (b) in what capacity; (c) at what salary; (d) when he left the vessel; (e) under what circumstances."

As to whether he was in the employ, the answer is yes.

The answer to (a) is that he signed on July 23, 1945; the answer as to capacity, (b), Second Assistant Engineer. The answer as to the salary, (c), \$220 per month. As to

when he left the vessel, the answer is, (d), December 1, 1945.

As to the circumstances, (e) "Removed to U. S. Marine Corps Division Field Hospital No. 1, Tsingtao, China, for medical observation."

Now, as to No. 9:

"Did you know that McAllister was sick during the month of November, 1945?" The answer is: "No."

(Reading) "If so, state (a) through what source you obtained such information." Of course, that is no.

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(Reading) "(b) Did your master have any information that the libellant was ill?"

That has not been answered, your Honor, and I think we are entitled to it. It says, "(b) See deposition of master taken August 14, 1952."

I think we are entitled to have the respondent state whether the master knew or did not know.

Mr. Gray: The answer is no.

Mr. Rassner: No! The master did not know!

The Court: The answer is no.

Mr. Rassner: Very well.

(Reading) "(c) Did the purser have any knowledge or information that the libellant was ill?"

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The answer to (c) is, "Pharmacist's Mate believed the libellant was ill when he was evacuated to the hospital at Tsingtao," and that does not answer the question.

The question is, "Did the purser have any knowledge or information that the libellant was ill?"

I call your Honor's attention to the fact that the illness report gives the date of illness as the 24th. Now I would like to know if there is any question about the pharmacist's mate having made that record—

Mr. Gray: In the answer to that same interrogatory, 9(a), it is answered—(reading)— "Libellant reported to pharmacist's mate that he commenced to feel dizzy on November 24, 1945."

The Court: Very well.

Mr. Rassner: Then, of course as to (d), "Did any person employed aboard the aforesaid vessel know that the libelant was ill," the answer is, "Respondent does not know." I think that that is an evasion. However, I won't press it.

I think I will omit reading the others because they don't seem to give us very much information until we come to No. 11.

(Reading) "11. State whether or not you or any of your officers or employees conducted any physical, medical or other professional examination of the libelant during his employment aboard the aforesaid vessel. If you did so, state (a) when; (b) where; (c) by whom; (d) the nature of such examination."

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And the answer is as follows:

"No professional medical examination was made of the libelant until November 30, 1945, when a Lieutenant Commander D. J. Giorgio, U. S. N. M. C. came on board for that purpose."

That date was November 30, 1945—the first examination made during this employment on the ship.

(Reading) "13. State who, if anyone, called for any assistance from without the vessel, giving (a) name; (b) rank; (c) the date of any such request; (d) where such request was made; (e) of whom such request was made."

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The answer to No. 13 is:

(Reading) "13. Patrick E. Napier, Pharmacist's mate, arranged on November 30, 1945, with Lieutenant Commander D. J. Giorgio, U. S. N. M. C., for the examination of the libelant and for his removal to Division Field Hospital No. 1, 6th Marine Division, Tsingtao, China."

(Continuing to read) "15. State whether you, your master, officers or any personnel of the vessel ever diagnosed the libelant's condition or made any attempt to do so. If so, state (a) who made such diagnosis; (b) when such diagnosis was made; (c) where such diagnosis was made; (d) the nature of such diagnosis."

The answer to No. 15 is:

(Reading) "15. Personnel of the vessel did not diagnose the libelant's condition. Diagnosis was not determined until December 11, 1945, while libelant was a patient on the U. S. S. Repose."

And I call your Honor's attention to the fact that that was a month after the libelant claims he took sick.

(Continuing to read) "16. State what treatment, if any, was rendered by you, your master, officers or members of the crew to the libelant, setting forth (a) who rendered treatment; (b) when treatment was rendered; (c) where treatment was rendered; (d) the nature of such treatment."

That is No. 16, and instead of saying what they did, here is the answer, and I don't think it is responsive.

(Reading) "16. While on board the vessel, the libelant received adequate and proper care and attention from the Pharmacist's mate and was given complete rest."

Now I ask counsel for the respondent to state what they did for him, if anything, or to admit that they did nothing for him—one or the other.

Mr. Gray: The treatment was complete rest, and I shall produce eminent authorities on polio who will testify that the only treatment you can give for polio, and the only treatment they give for polio until it has gotten to the acute stage, is complete rest. They leave them alone and let their own vitality fight the disease.

Mr. Rassner: I move that the answer be stricken out, other than "complete rest."

The Court: No.

Mr. Rassner: Because it is not responsive.

The Court: No.

Mr. Rassner: May I read the question? What he is going to do about it later is not responsive.

The Court: All right, you can show me. You are not bound by that answer.

And neither are you.

Mr. Rassner: They are bound by an answer to an interrogatory.

The Court: Not necessarily, if they have other witnesses. I will hold them to it. Don't worry about it.

Mr. Rassner (Reading): "17. State whether or not the purser of the vessel in words or in substance made a statement that the libelant was suffering with a venereal disease at any time while the libelant was employed aboard the aforesaid vessel. If so, state (a) when such statement was made; (b) where such statement was made; (c) to whom such statement was made."

The answer to No. 17 is:

(Reading) "17. Respondent does not know."

(Continuing to read) "19. State what drugs you had aboard the aforesaid vessel."

And the answer is: "19. Respondent does not know."

I don't think that is a true answer. Respondent was asked what they had.

The Court: Well, what about that, Mr. Gray?

Mr. Gray: We don't know. There was no inventory taken of drugs on this vessel. No drugs are ever used in polio.

The Court: All right.

Mr. Rassner (Reading): "20. State what facilities were available to (a) remove the libelant from the vessel; (b) transport him to a medical facility."

The answer to No. 20 is: "20. (a) Respondent does not know; (b) U. S. Marine Corps ambulance."

Now the respondent knows what facilities were available to move the libelant from the vessel or transport him to a medical facility were right there in the vicinity of that ship and I don't think they should be permitted to evade that question. There were two ships there.

Mr. Gray: There was no ship there, because our position is that this man did not report sick until the vessel was at sea. There was no hospital ship at Tsingtao. The only hospital arrangements were with the Marine Corps Hospital.

Testimony.

The Court: All right.

Mr. Rassner: The answer is "Respondent does not know."

The Court: All right, go ahead.

What is the date of these interrogatories? Those are for this case?

Mr. Rassner: Yes, for this case.

The Court: This wasn't presented at the trial?

Mr. Rassner: No, your Honor.

Mr. Gray: They were served on us on November 6, 1952.

The Court: All right.

Mr. Rassner (Reading): "21. State the nature of the medical facility.

"22. State the location of the medical facility."

And both of these were answered as follows:

(Reading) "21, 22. Respondent cannot answer these interrogatories because they are indefinite."

However, I will proceed further.

Mr. Gray: If you will just listen to these, your Honor: "State the nature of the medical facility."

Who can ever answer that is more than I can understand.

The Court: Well, you knew what they were trying to find out. Both sides knew. And whether you have anything on board to treat somebody with.

Mr. Rassner: Exactly.

(Reading) "23. Did you, your master, or any officer employed aboard the vessel at any time visit the libelant while he was confined to his quarters? If so, state (a) when such visit or visits were made; (b) who was present during such visit or visits; (c) the number of visits made."

Instead of answering that in any way so as to give us factual information, here is the answer they give:

"23. The Pharmacist's mate visited libelant while he was confined to his quarters."

The Court: Well, these questions were asked about how long after the incident?

Mr. Rassner: At the time, on November—

The Court: No—I mean you asked them about something that happened several years before.

Mr. Rassner: Yes.

The Court: And you expected them to tell you all those details?

Mr. Rassner: If they have a report or they claim that the master did visit the libelant—

The Court: Your client knows.

Mr. Rassner: Oh, yes. We stand ready to prove it.

The Court: All right. Your client can answer your question.

Mr. Rassner: Oh, no question about that. I merely wanted to call your Honor's attention to the method of defense of the Government in this case. That is the purpose of it.

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The Court: All right.

Mr. Rassner: I will only take another minute or two to demonstrate the position the Government is taking in this case.

(Reading) "24. Describe the condition of McAllister during this visit or visits."

The answer is:

"24. Resting."

Now I would like to call Mr. McAllister to the stand.

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The Court: I am going to recess at 12 o'clock—

Mr. Rassner: Oh, well, then suppose—well, we will have to go over until tomorrow morning.

The Court: If you have anything that you think we can get out of the way in the next few minutes, all right.

Mr. Rassner: Yes, I have something.

May I offer in evidence—

May I have about five minutes to get through with one witness? He is from Ohio.

The Court: Yes, surely.

Mr. Rassner: Mr. Benz, will you come up, please.

FRED BENZ, called as a witness on behalf of the libelant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Benz, you have already testified on behalf of Mr. McAllister in a different case? A. I have.

Q. Involving the Haines; is that right? A. Yes.

Q. And that is the action by Robert McAllister against Cosmopolitan Shipping Company, Inc.

Mr. Gray: That is objected to; immaterial and irrelevant.

The Court: Overruled.

Q. Is that correct? A. Yes, sir.

Q. Where do you live now, Mr. Benz? A. Cincinnati, Ohio.

Q. How old are you? A. Thirty-four.

Q. How long have you been a seaman? A. How long?

Q. Yes. A. Well, during the war, I think I went in in April, 1943, and then when I got off the Haines this last trip, that is when I went back to Cincinnati.

192 Q. Are you a married man living with your family? A. I am.

Q. Were you employed on the Haines at the same time that Mr. McAllister was? A. Yes.

Q. In what capacity were you employed? A. Well, I was deck engineer.

Q. Were you any particular friend of Mr. McAllister? A. Well, no. Well, he was, I mean—he was an officer and an engineer, and I was just one of the crew members.

Q. Now, when did you first observe anything out of the ordinary, if you did, with respect to Mr. McAllister?

Mr. Gray: That is objected to. Immaterial. The witness is not qualified. No foundation laid.

The Court: Overruled, and I give you an exception. Go ahead.

The Witness: May I have the question repeated?

The Court: Read the question, please.

(Pending question read by the reporter.)

Mr. Gray: I object to the question, your Honor. 'Out of the ordinary' is so general—

The Court: Well, he means out of the ordinary physically.

Don't you, Mr. Rassner?

Mr. Rassner: Yes, sir.

The Court: Certainly.

Go ahead.

A. I was deck man aboard the ship and generally if any of the engineers, if anybody wasn't able to do duties, I generally fell in line and took over whatever they need me to do, if someone was sick.

Q. Did you ever take over for McAllister? A. Well, I have done jobs for him, yes.

Q. How long before he left the vessel were you called upon to take over his work? A. Well, through the trip, through China, there, I mean, I have done odds and ends. I have stood watches. I also made soundings, like fuel soundings, fuel oil soundings. That is what you are called on mostly to do.

Q. And under what circumstances did you take over his duties? A. What circumstances? I don't.

Q. Why? What was the reason for it? A. Well, he was—the way I understand, he has been confined to his room. He was sick.

Mr. Gray: That is objected to. It should be placed in time—the time this occurred—the position of the ship—the date. This is much too general.

The Court: What he understood is not—

Mr. Rassner: That is right. I consent to that.

Q. We are agreed that Mr. McAllister was taken off the vessel on December 1, 1945. Now, how long before December 1, 1945, did you start taking over his duties? A. Well, when we come up from—

Q. About how long? A. Approximately, well, a week, I guess a week, ten days.

Q. Between a week and ten days? A. Yes.

Q. Now, under what circumstances did you take over his duties during that week or ten days before he left the vessel? A. Well, his watch—

197 Q. Explain that to his Honor—just why you took over his duties before he left the vessel. A. As to watches. His watches. I mean he was sick, so the first assistant asked me if I would take care of his duties. I worked with the first assistant on many jobs, all jobs, and whenever he asked me to do something, I just helped him out.

Q. What did you observe about Mr. McAllister? A. Well, really—

Mr. Gray: That is too general—"What did you observe about Mr. McAllister." I ask that you make it more specific.

Mr. Rassner: All right.

Q. When you were first called upon to do his work, under what circumstances did that happen? Just who said what to you? A. Well, the First asked me that— Mr. McAllister wasn't able to stand the watches. He said there was something the matter with him.

Mr. Gray: That is objected to as hearsay. Not binding on the ship.

The Court: It is hearsay.

Mr. Rassner: Except, if he was an officer—

Q. Who was the First? Was he an officer? A. Yes, sir.

Mr. Gray: He is not the Master. The Master is the only one who can bind the ship.

Mr. Rassner: That is not the law, your Honor.

The Court: Well, in other words, when you took the job over, it was to do something, that is, one of the jobs that was assigned to McAllister?

The Witness: That is right. I was pinch hitting for the man.

Q. Under whose instructions did you do that? A. Why, the First Assistant.

Q. The First Assistant engineer? A. Mr. Bullis, yes.

Q. That was about a week or ten days before Mr. McAllister left the vessel? A. That is right; that is right.

Q. And did you continue right through that week or ten days?

Mr. Gray: That is objected to as leading.

A. Yes, yes, I did.

The Court: Go ahead.

Mr. Rassner: Your witness.

Cross Examination by Mr. Gray:

Q. Did you say you stood a watch for McAllister? A. Yes. I stood quite a few of them for McAllister.

Q. You mean for the last ten days between the 20th of November and the 1st of December, 1945, you stood watches in the engine room? A. Oh, no. I won't make no specified time.

I stood watches for Mr. McAllister while we were going to Tsingtao.

Q. While you were going to Tsingtao? A. That is right.

Q. What watches did you stand? A. His second watch. Generally, what I did, the First Assistant would take over

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his watch. I would always stand the day watch for the First Assistant, or go into the day watch, the 4 to 8 watch.

Q. What license do you hold? A. None.

Q. And what license did you hold then? A. None.

Q. You didn't hold a First, Second, or Third engineer's license? A. No, sir.

Q. And the First Assistant put you in charge of the engine room while the vessel was at sea? A. I was put in charge. I have—if you will check your papers of coming off the ship, I have a Third engineer's discharge for time I put in all during that trip as Third engineer.

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Q. What are your usual hours of watch on board the ship? A. Eight hours a day, day work.

Q. Day work. A. That is right.

Q. And anything over those eight hours is overtime to you? A. No, sir. Another oiler was put on my job as deck engineer, and I was made First Assistant full time.

Q. You were made a First Assistant? A. Pardon me. Third Assistant. I am sorry, sir. I stood the first watch, the 4 to 8 watch, for the First Assistant under the Third Assistant. I will put it that way.

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Q. Then when McAllister went ashore on the 1st of December, you became Third Assistant engineer? A. Let's see—that you will have to get your papers, on that, I think.

Q. And do you remember whether you were made Third Assistant engineer? A. Why don't you check the papers? I have a discharge from the Cosmopolitan as Third Engineer.

Q. I am asking you now, Mr. Benz, whether you acted as a Third Assistant engineer on board the Haines between the 20th of November and the 1st of December, 1945. A. I did.

Q. Where did you stand your watch? A. In the engine room.

Q. Did you make entries on the engine room log? A.

I never signed the engine room log. The First Assistant always signed the log. I never signed the log.

Q. Did he sign your name in the log? A. No, sir. He signed his own name.

Q. So that whatever watches you stood were recorded as having been stood by the First Assistant engineer. A. That is right.

Q. And at that time you held no license as either First Assistant or Third Assistant engineer? A. I have no ticket whatever as Third engineer. I am strictly a deck engineer. That is the highest—that is the sailing papers I hold.

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Q. Did you stand any watches while the vessel was at anchor in the roadstead off Tsingtao? A. That was on day watch, where an engineer took—very seldom I did that, on account of—

Q. Did you or didn't you? A. Well, I will say yes, I did.

Q. When? A. The date?

Q. Yes. A. Oh, I don't know.

Q. How many days before the 1st of December? A. Well, we got in there—let's say over Thanksgiving—there were then two Thanksgivings that year, the last Thursday of that November. That is hard. That is a long time ago. I can't—I won't make no statement on that.

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Q. What were your duties as a deck engineer? A. Taking care of deck machinery, all steam lines leading to and above deck—

Q. When you sounded the oil tanks, the fuel oil tanks, did you sound them from the deck? A. Absolutely. That is, most of them. I wouldn't say all. There are quite a few soundings from the deck.

Q. Are those the soundings that you made? A. Yes. The fuel oil soundings on deck.

Q. And you were asked to do that by the First Assistant engineer? A. Right.

Q. Do you know the time of the day when you made those soundings? A. No. There was no—generally at a certain time, maybe right after dinner every day, something like that, we took them, to get a fairly 24-hour reading.

Q. You took the deck soundings habitually on the fuel oil through that voyage, didn't you? A. No. No. That was the Second's job—the Second engineer took care of that job.

Q. You only took them while the vessel was running from Shanghai to Tsingtsao? A. That is right, unless somebody—

Mr. Gray: That is all.

A. —was running—

Mr. Gray: That is all.

The Witness: Okay, sir.

The Court: Is that all?

Wait a minute, there may be some more questions.

Mr. Gray: (Addressing the witness) I show you this paper and ask you if that is your signature at the bottom (indicating).

The Witness: Yes, that is mine. That is right.

Mr. Gray: I ask that this be marked for identification.

Mr. Rassner: May I see it?

Mr. Gray: I ask that this be marked Respondent's Exhibit A for identification.

Mr. Rassner: May I see it?

Mr. Gray: No; it is being marked for identification.

Mr. Rassner: May I see it?

The Court: Why not?

Mr. Gray: I object. It is for identification.

The Court: You can let him see anything you put in.

Mr. Gray: Not until it is offered in evidence, your Honor. I don't have to tip my hand—

The Court: Go ahead.

You asked him whether that is his signature?

Mr. Gray: Yes, sir.

The Court: Go ahead. Let's try this case.

Mr. Gray: First I ask to have this marked for identification.

The Court: It is being marked for identification. Let Mr. Rassner see it. 212

Mr. Gray: Well, when it is marked I will let him see it.

(Paper marked Respondent's Exhibit A for identification.)

The Court: We have no secrets.

All right, now, what is it?

Mr. Gray: This is an overtime sheet for this witness on the Haines, which foots to \$43.35.

Mr. Rassner: Are you through with this witness?

Mr. Gray: No.

The Court: All right. Now that has been marked for identification? 213

Mr. Gray: Yes, sir.

The Court: You are not through with him yet?

Mr. Gray: No sir, not yet.

The Court: All right.

By Mr. Gray:

Q. I show you another sheet and ask you whether that is your signature at the bottom. A. It is.

Mr. Gray: I ask that that be marked for identification.

The Court: The same thing, isn't it?

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Fred Benz—Re-direct.

Mr. Gray: This is another sheet which foots to \$57.80—another overtime sheet.

(Overtime sheet marked Respondent's Exhibit B for identification.)

Mr. Gray: Would you like to see this too, Mr. Rassner?

Mr. Rassner: Yes.

The Court: It is the same thing.

Mr. Rassner: The same thing, isn't it?

Mr. Gray: Yes.

That is all.

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The Court: Is that all now?

Mr. Rassner: I would like the witness to see both these papers and tell the Court what they are.

The Court: They are in evidence, aren't they?

Mr. Rassner: No, but they might be, on my offer.

(Addressing the witness) Tell the Court what both these papers are, just as they are marked.

The Witness: Well, this is your time that I took care of watches outside of my day work.

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Redirect Examination by Mr. Rassner:

Q. Will you tell his Honor which one of those watches you took care of that was not your work, and that was McAllister's work. A. Well, let's see, on here—

Q. Which one is that? A or B? A. Well, here is one here, getting lube oil from tanker. I mean stuff like that. Taking men to hospital. That is topsides job.

Q. What date is that? A. This is December 10th. Here is one December 13th.

Q. That is after he was off the ship. We are concerned with before the 1st of December. A. Well, I won't say any. None.

Q. Now, who signed his book? McAllister's book? A.

Well, most likely, if I recall, I may be wrong, but I think it was taken up to him to sign.

Q. Is that your best recollection? A. Yes.

May I say something?

Mr. Rassner: Go right ahead and explain anything you want.

The Witness: When I was saying I was Third, which you can check with the company on the discharge, I was, well, officially, as far as the logbooks aboard the ship was concerned, that was after McAllister was taken off. Now, wait a minute. I sailed as Junior engineer. Whenever anything came up I worked in the engine room, which, through the First Assistant, through Captain Leavitt, through the Chief Engineer—I did all that work in the engine room, which they will—

Mr. Gray: Which what?

The Witness: Which they will verify.

Recross Examination by Mr. Gray:

Q. Was there a man named Kavanaugh on board the Haines? A. Well, yes.

Q. Wasn't he made Third Assistant engineer after McAllister was taken off? A. He was made—

Q. Yes or no? A. Well, I won't say yes or no.

Q. You don't know? A. Oh, yes, I do. He was Third and Second. Now, just in between time in there, I won't say. He was Second. He worked Third, and he worked Second, all in a turn over there.

Q. Wasn't there a man named Luman aboard? A. Well, Luman went, then he moved up into first place for awhile.

Q. What became of the First Assistant? A. The First Assistant?

Q. Yes. A. Well, he—

Q. You did not allow for him, did you? A. Oh, absolutely I did. I worked with him all the time.

Q. How do you account, then—

The First Assistant wasn't taken off, was he? A. Well, he generally—

Q. Was he taken off? A. No.

Q. Luman was the Third Assistant when McAllister was on there? A. No. Luman was—Third—that is right, sir.

Q. All right. Luman went up to McAllister's place when McAllister left the ship? A. To Second, that is right.

221 Q. And Kavanaugh went up to Luman's place at the same time. A. He was Junior engineer at the time.

Q. At what time? A. Well, when McAllister was on.

Q. I am not asking you about that. I am asking you, when McAllister left the ship, Kavanaugh went up to Luman's place as Third Assistant, didn't he? A. After he was taken off.

Mr. Gray: That is all.

Mr. Rassner: No further questions.

Mr. Gray: Oh, just one question—didn't the work—

Well, strike it out. Withdrawn.

The Court: Is that all?

Mr. Gray: That is all.

The Court: We will now take a recess until tomorrow morning. Do you want to do that, or do you want to come in at two o'clock tomorrow?

Mr. Rassner: Two o'clock, your Honor.

Mr. Gray: I have no objection.

Mr. Rassner: Two o'clock.

The Court: All right, two o'clock tomorrow afternoon.

(Witness excused.)

(Adjourned until Tuesday, January 13, 1953, at two o'clock p. m.)

Testimony.

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Brooklyn, New York,
January 13, 1953.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED.

Mr. Rassner: Your Honor, I would like to add another sentence to the paragraph on negligence which I dictated on the record yesterday.

The Court: Yes.

Mr. Rassner: The sentence is: That the defendant was negligent in causing, allowing, and permitting disease to be spread by carriers so as to cause the libellant to become infected with the polio virus.

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Mr. Gray: Between what dates?

I think that should be clarified to state between what dates.

Mr. Rassner: While in the employ of the respondent on the Haines.

At this time I would like to offer in evidence the Captain's deposition.

Mr. Gray: This is the original (indicating).

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Mr. Rassner: As part of the libellant's case. The deposition was taken by the respondent.

(Deposition of Bert R. Leavitt, taken on Thursday, August 14, 1952, received in evidence as Libellant's Exhibit No. 2.)

Mr. Rassner: There is no point in reading this, your Honor. Your Honor will have to look at it anyhow.

The Court: That is right. I will have to look at it.

I was wondering, also, although I think it is a little late now, whether or not we could have an advisory jury.

Mr. Gray: Not in admiralty, sir.

Mr. Rassner: We can. The law permits it.

Mr. Gray: Only on the Great Lakes. That is the only place it can be used.

Mr. Rassner: The law permits it here and every other place in the country, but the answer is still no!

The Court: I am afraid it is. That is the result of my investigation. I thought perhaps you might find amendments or something along that line. I haven't been able to find them.

(Discussion off the record.)

Mr. Rassner: Mr. McAllister.

ROBERT A. McALLISTER, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. McAllister, you are the libellant, the party who is suing in this case? A. That is right, sir.

Q. Where were you born? A. Brooklyn, New York.

Q. When? A. July 16, 1920.

Q. And you are a married man living with your family? A. Yes, sir.

The Court: Mr. Gray, can you hear well over there?

Mr. Gray: Yes, sir.

I am going to move over here.

(Discussion off the record.)

Q. How far did you go in school? A. I have a high school equivalency diploma, and I also spent one year in

business school, and six years at intermittent times at the Washington-Irving High School.

Q. When did you first go to sea? A. July, 1941.

Q. Did you do any other work between your high school, or your schooling, and the time you went to sea? A. Yes, sir.

Q. What kind of work? A. Well, it was various jobs, whatever I could possibly get at that time. Things weren't too good at that time.

Q. Manual labor, clerical? A. It was manual labor; factory work.

Q. What tickets do you hold as a seaman? A. I hold a Second Assistant and Assistant Engineer's license, and a Third Assistant diesel engineering license.

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Mr. Rassner: Perhaps we can shorten the record if Mr. Gray and I can agree on the factual situation.

(Discussion off the record.)

Mr. Rassner: May the record show that the vessel sailed from New York on July 24, 1945—

Mr. Gray: July 31st.

Mr. Rassner: All right, I will agree to the 31st. July 31, 1945—for the Far East, and the itinerary of the vessel is stipulated as being correctly set forth in the answer to the interrogatory—

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Mr. Gray: Just a minute. May it also be stipulated that the itinerary is as it is set forth in the respondent's trial memorandum?

Mr. Rassner: I am not concerned with that. No. In the answers to the interrogatories.

Mr. Gray: But that only covers, I think, from Hong Kong from September on.

Mr. Rassner: I will consent to any dates you want to add to that, but for the purposes of the libellant the dates set forth in the answers in the interrogatories with reference to the itinerary of the vessel are correct.

The Court: All right.

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Robert A. McAllister—Direct.

Q. Now, when did you first take sick? A. Well, I first didn't feel too well on the voyage from Hong Kong back to Shanghai.

Q. When was that? A. About the 9th or 10th of November.

Q. 1945? A. 1945.

Q. Now, how long before that had you gotten or received a physical examination? A. Before the ship left New York I had a physical examination.

Q. That a pre-employment examination? A. Yes, sir.

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Q. By the respondent's doctor; is that right? A. That is right; by the Government doctor.

Q. And after that examination you were passed— A. To go aboard the vessel.

Q. Were you advised that there was any ailment that you had, by the doctor? Did you go under any limited shipping condition? A. No, sir. No, sir; he passed me.

Q. You were passed? A. That is right.

Q. Now, you say that about the 11th of November you first started to feel ill?

Mr. Gray: He said the 9th or 10th.

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Q. On the 9th or 10th you first started to feel ill? A. Yes.

Q. About the 11th where were you. A. On the 11th we reached Shanghai.

Q. Now, on that day what was your job? A. Second Assistant Engineer.

Q. And how had you signed on? A. As a Second Assistant Engineer.

Q. And you remained in that capacity throughout the voyage? A. That is right, sir.

Q. What was your salary? A. \$220 a month.

Q. What was your overtime average? A. Approximately around \$100. Around \$100 a month.

Q. Now, will you tell his Honor what happened from

the time you first took ill until you left the vessel—in your own words? A. Well, your Honor, the first symptom that I felt was on this trip down from Hong Kong to Shanghai, back to Shanghai the second time.

It was like a dizziness.

If I made a sudden movement, or move, I could not focus correctly immediately, and—like spots.

At that time I started taking salt tablets.

I attributed it to the fact that perhaps down in the engine-room it was warm.

And then when we arrived at Shanghai, around the 11th, and approximately around that time, I complained to the First Assistant—the First Assistant Engineer—that I did not feel too well, but I went on with my regular duties, as I didn't think I was sick enough to forego the duties.

And the next symptom I started to feel, I could not bite. I could not consume any food, in the sense that I could bite it to digest it, and even that didn't strike me as anything too bad at the time.

Well, that is the next time I really started complaining much more than usual, that I could not bite, and I felt that—well, I just don't know what I felt.

Then, as I went on I started to get nauseous to the pit of my stomach, and a weakened feeling all over me, and I went to bed in November—about the 21st of November I went into my bed, and I stayed there, and different persons visited me at times. It was the Chief Mate, the First Assistant Engineer would come in and ask me how I felt, and I told him how I felt, and that I wasn't feeling too well.

In fact even the purser came in there to look me over, and I told him I didn't feel too well either.

The Court: Did you have a sore throat?

The Witness: To tell you the truth, your Honor, that is what I first thought that I really was having,

was a sore throat, and I didn't think it was anything much more than a sore throat, because I had them before, and I would never—but as this developed I started getting a little worried, because even with the most severe throat I had before I could usually always move my face to some degree.

And the purser, he looked me over then, and he took my temperature, and I was lying in bed. About that time I had a very flushed, a flushed feeling, as if I had a high, a very high temperature, but he took my temperature, and according to him, he said to me "Gee, Mac," he didn't make any particular issue about the temperature.

I felt a little funny and self conscious because I felt that I should have something that should indicate a high fever or so, and then I believe the ship started up toward Tsingtao, and it was general knowledge, I mean, among the people aboard the vessel, that I wasn't feeling too well.

Mr. Gray: That is objected to, and I move to strike that out—general knowledge.

The Court: All right.

Go ahead.

The Witness: I am sorry.

Well, I had mentioned to anyone who came in to visit me that I didn't feel too well, and they knew it, and they said they were going to attempt to do something for me.

In fact at one time the First Assistant, even the Chief Mate, on revisiting me, mentioned that I was still aboard the vessel, and naturally I just said, well, I was there, and there was nothing more—there was no better proof than that, and then the ship, your Honor, went up toward Tsingtao, and I stayed in bed during that time. In fact from that time on I stayed in bed until I was taken off the vessel at Tsingtao on December 1, 1945.

Your Honor, that is—

The Court: You were taken off, or did you walk off, or what?

The Witness: I was assisted off by two naval corps men, I believe they were. Corpsmen of the United States Marine Corps on detached service from the Navy.

Then they took me to that hospital at Tsingtao.

Q. And while you were aboard the vessel did you observe what drinking facilities were there? A. Yes, sir, I did.

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Q. What were they? A. There was one water fountain on the main deck, outside of the officers' salon.

Q. Had you received orders from the master not to eat ashore or mix with the various Chinese people ashore? A. Yes, sir, I did.

Q. And had you been warned by the master and by various of the officers that there was a polio epidemic— A. Along with other diseases, yes.

Mr. Gray: That is objected to as leading, and I ask to have it stricken out.

The Court: Well, there is no jury here.

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Overruled.

Mr. Rassner: The master has so testified. I mean there is no dispute about that. I am just asking him if he got that information from the master himself.

Mr. Gray: The question was whether there was a polio epidemic.

Mr. Rassner: And the master said yes. There is no dispute about it.

Do you deny it?

Mr. Gray: I deny it.

Mr. Rassner: The master says there was, and Mr. Gray says there wasn't.

Do you want to take the stand and deny it? The master says that there was an epidemic.

Mr. Gray: I can prove that there wasn't.

The Court: All right, I will take it.

Go ahead.

Mr. Rassner: The master said that it was.

Q. In any event, did you mix with the Chinese ashore?

A. No, sir, I didn't.

Q. Did you go ashore and eat in common public places with the people? A. Well, I had a fortunate occurrence happen to me at that time.

I ran across an Army sergeant from my home town, your Honor, and he and I went out a few times after he had been a guest on my vessel at various times, and he brought me up to the hotel where the Army soldiers were stationed, and I was entertained there, and I attended different theatres in his company while he was free. He also was working on the vessel that I was on and during the lunch periods or so at times he would be aboard the vessel.

Q. Did you mix with the Chinese ashore? A. No, sir, I didn't.

Q. Now, did various Chinese people come aboard? A. Yes, sir.

Q. Do you know whether or not special facilities were made for them, toilet facilities? A. Yes, sir, I do know that.

Q. What was that? A. On the deck they had built a wooden trough for these Chinese soldiers or civilians.

I just don't know what exactly their category was, your Honor, but there was a wooden trough built aboard the vessel for the purpose of them excretionary measures, and a hose was laid onto the deck, and into the trough, to keep it flushed of all matter while they were aboard the vessel.

And unfortunately they turned that off. I don't know what the purpose was, why they would do it, but they did turn that off occasionally, which required me on one or

two occasions to go up on the deck, because down in the engine room I could see the pump, that it was building up pressure, and I went up on the deck, to check it, and opened the valve, and I complained to the First Assistant Engineer of the fact that the water hose was being turned off on the deck.

Q. As a result of that were you required to use the common toilet facilities with the shore people? A. Their trough?

Q. Their toilet facilities? A. I never used their toilet facilities.

Q. Did these Chinese people have access to your toilets—the officers' toilets and the crew's toilets? A. Oh, yes, sir, that they did. They had access to our—

Q. Were any means taken to prevent the shore people from using the toilet facilities assigned to the officers and crew of the ship? A. Complaints—that is just about all.

Q. That was all? Just complaints? But nothing was actually done to stop them? Is that right? A. That is right, sir.

Q. Now, what about your cooks? Where did they come from? A. The cooks aboard the vessel I believe were hired in New York, along with the rest of the—

Q. Were there any replacements, that you know of? A. That I know of, no; I could not say that. I don't know.

Q. How about cooking utensils? Were there any differentials made between the cooking utensils for the shore people and those for the crew and the officers?

Mr. Gray: That is objected to. No foundation has been laid as to his observation of what occurred in the galley. If he went into the galley and saw them preparing the food, he is in a position to answer that question, but otherwise he is not.

Mr. Rassner: Question withdrawn.

Q. Were you in good health when you joined the vessel? A. Yes, sir, I was.

Q. What about your complaints, the way you felt—your head, your neck, your limbs? How did you feel? A. Well, even at that time, when I had all those complaints I was pretty worried myself.

Q. Tell me what those complaints were? A. Well, at that time, when I really felt bad, I had a stiff neck.

Q. How about your arms and your legs? A. Well, there was like pain running up in sections.

Q. Were you able to move them freely? A. I could move them, yes, sir.

251 Q. Could you move them freely? A. Not as rapidly as I ordinarily did, but I could move them.

Q. And how did that progress as time went by? A. Oh, eventually it led up to my present state.

Q. Well, while you were aboard the ship, what did you observe as to your condition? Did it change? A. Well, it didn't improve. It got worse gradually.

252 Q. That is what I am trying to find out. When you say it got worse, what do you mean by that? A. I wasn't eating anything, and that alone—and I had been nauseous, but the First Assistant Engineer had given me a bicarbonate of soda, which I had taken, and I vomited after I had taken that, and that eased the tension that seemed to be on my stomach, the full sensation, and after that, though, I never, I believe, I am positive I never vomited after that. I felt better in that respect, but worse in others, as I just kept getting weaker and weaker.

Q. And what happened to your neck, your arms, and your legs as time went by? A. As time went by?

Q. Yes. A. They became paralyzed.

Mr. Gray: Your neck?

The Witness: As time went by.

Q. While you were on the ship what happened with your neck, arms, and legs? A. Oh, while I was on the ship it was just that burning sensation, spasms and involuntary twitching of the muscles.

Q. Did that get worse or better while you were on the ship as time went by? A. Well, that got worse.

Q. How was your appetite? A. It was poor.

Q. Did you lose it, or was it just poor? A. It was just poor. I lost it and—I didn't have any—

Q. Did you feel as strong as you did when you joined the vessel? A. No, sir, I didn't.

Q. How did you feel? A. I felt very weak.

Q. How about your back? Did you notice anything about your back? A. Not particularly while I was on the vessel, that I recall—

Q. How about your head? A. I just had dizziness, that is about all.

Q. Did you receive any hospital treatment aboard the ship? A. No, sir, I didn't.

Q. Did the master ever come to see you while you were sick? A. No, sir, he didn't.

Q. Did you stand your watches during the last ten days or so before you were taken off the ship. A. No, sir, I didn't.

Q. Did you sign the logbook. A. Yes, sir.

Q. Will you explain to his Honor how that was arranged? A. Sometimes aboard vessels, your Honor, either for the purposes—not always when a person has to be ill, either—someone else stands their watch and allows you to sign the logbook as if you had stood the watch. It has been the practice that has been used going to sea for quite awhile. As long as it is an agreement, or arrangement, on anyone concerned, there is no objection offered to it by them.

Q. Is that what you did? A. That is what I did, yes, sir.

Q. Did you stand any of your watches during the last ten days before you were taken off? A. From the time I took to the bed to the time I was taken off the ship I did not stand any watches at all.

Robert A. McAllister—Direct.

Q. Did you get any medication at all while on board the ship? A. Only that bicarbonate of soda.

Q. Did you get any particular food? A. The steward gave me a can of tomato juice.

Q. Was that substantially all that you had during that time? A. That was substantially all I had.

Q. Now, when you were taken off the ship where were you taken? A. I was taken to the Marine Corps Hospital at Tsing Tao in North China.

Q. How were you fed there? A. Intravenously.

Q. Can you tell his Honor the circumstances under which they decided to feed you intravenously? A. Well, I could not get up there out of the bed, your Honor, to get any food myself, and it was brought in on a pot, in a pot, rather, and put in the center of the floor, and the patients more or less helped themselves to the food that was in that pot, and well, naturally, I hadn't been going up to get anything, although a marine next to me, a very nice fellow, he offered to get me anything from there that I particularly wanted, and he did bring back something from there one time, but I didn't eat it, and from that day, I guess, they assumed that they better give me something, and they started to feed me intravenously from a bottle they hung up on the wall, and they put a needle in my arms, and that is the way they were feeding me, your Honor.

Mr. Rassner: Now I think we can agree on what took place from there on.

(Discussion off the record.)

Mr. Rassner: It is agreed that the illness was diagnosed ashore as polio on December 11, 1945.

Mr. Gray: Not ashore, but on the U. S. Repose.

Mr. Rassner: Yes. May I correct that? On the Repose, on December 11, 1945.

He was then flown to Shanghai, where he was received on—

Mr. Gray: No, no; wait a minute. He was flown from Tsing Tao to Shanghai.

Mr. Rassner: Yes.

Here, suppose you follow it there, and you tell me if you object to anything there.

Mr. Gray: That is incorrect. He was flown to Shanghai from Tsing Tao and he was not diagnosed as polio until after he had arrived at Shanghai from Tsing Tao.

Mr. Rassner: That is right.

Mr. Gray: Four days later.

Mr. Rassner: That is right.

He was received on board a hospital Navy ship—that is the *Repose*.

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Mr. Gray: The U. S. S. *Repose*, that is right.

Mr. Rassner: And his legs were immobilized with sandbags.

On December 13th he was flown to the Naval Base Hospital at Guam.

Mr. Gray: On December 18th it was.

Mr. Rassner: Well, I will agree to that date.

On December 18th he was flown to the Naval Base Hospital at Guam, where sandbag treatment continued until after the 23rd.

Do you agree with that?

Mr. Gray: Wait a minute.

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He was flown to the United States Naval Hospital at Guam on the 18th.

Mr. Rassner: All right.

Mr. Gray: And he was admitted to the United States Naval Hospital at Guam on the 19th.

Mr. Rassner: Yes.

Mr. Gray: And on the 31st of December he was transferred to the U. S. S. *Dawson*.

Mr. Rassner: Yes.

Mr. Gray: For transportation to San Francisco. He was admitted at the United States Marine Hospital of the Public Health Service in San Francisco on January 17, 1946.

By Mr. Rassner:

Q. Now, when you arrived at the Marine Hospital in San Francisco do you know what kind of treatment you got there? A. They instituted the Kenny treatment.

Q. Is that the first time they instituted that Kenny treatment? A. That is right, sir, the first time.

Mr. Rassner: Now, do we agree on the following dates—

(Discussion off the record.)

Mr. Gray: He was discharged from the Marine Hospital on the 19th, April 19th, and admitted to the Marine Hospital in Staten Island on April 21. He was discharged from the Marine Hospital on May 9th.

Mr. Rassner: All right, May 9th. I will take your dates. For treatment at Bellevue?

Mr. Gray: For treatment under the—for treatment by the National Infantile—

Mr. Rassner: The National—

The Witness: The National Foundation.

Mr. Gray: National Polio Foundation.

Mr. Rassner: Let me give you the correct name of it. National Foundation for Infantile Paralysis.

Mr. Gray: That is it.

Mr. Rassner: He was discharged from the Marine Hospital at Staten Island on the 8th day of May, 1946, for treatment at the Bellevue Hospital under the supervision of the National Foundation for Infantile Paralysis.

Mr. Gray: That was the 9th, Mr. Rassner.

Mr. Rassner: Well, I will take your date. On the 9th. Later treatment was received at the Hospital for the Ruptured and Crippled, under the same auspices.

And then he went home, where he had treatment by a visiting nurse for the balance of that year, 1946.

By Mr. Rassner:

Q. Now, since the end of 1946, will you tell his Honor what you have been doing? A. From 1946 until about 1948 I received treatment at different times.

From the Bellevue Hospital.

From the Institute for the Ruptured and Crippled at 23rd Street.

From 1948 on, your Honor, I haven't received any treatment.

I was looking out for positions to get out into the world again, to make my comeback to earn a living, and the following year, in 1949, in October, I was fortunate enough to secure a job, and I have been working steady along at a regular job to try and support my family the best I could.

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The Court: What kind of a job?

The Witness: Well, sir, first clerical work, stenographic and typing.

I went to school, the New York State Vocational Rehabilitation. They took me over, and they allowed me to pick out a school, anything I wanted, or felt I would particularly like, and they gave me an aptitude test, and it came out that typing and stenography would be perfectly all right with them, and I felt I would like to do that sort of work, and for one year I attended school, and I wanted to go on to Hunter College to continue, to become a shorthand reporter, but they didn't have any more funds available for me, and that was the end of my schooling at the New York State Vocational and Rehabilitation, although I went up to Hunter College myself and tried to finance it, and it never materialized.

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Q. When did you first go to work after you left the Haines? What was your first job? A. October, 1949, was my first job.

Robert A. McAllister—Direct.

Q. In what capacity? A. I was a ticket clerk for the Whale Oil Company in Brooklyn, New York.

Q. And how much did you get a week? A. \$35 a week.

Q. And what have you been averaging since? A. Well—

Q. How much money have you been averaging since?

A. Well, right now I earn \$45 a week for a five and a half to six-day week.

Q. Well, how much have you been averaging? A. It has been running around that since. I started at \$35 a week. I went up—

Q. Between \$35 and \$45? A. Well, I went up as high as \$62.50 in one job.

Q. Well, now, you know best how much you have been averaging. A. Do you want my jobs in chronological order?

Q. No. I want to know the average. A. Well, say around \$45 to \$50 would be an average.

Q. Has your physical condition improved any in the last three or four years? A. My ability to get around has—to make use of what I have left—that has improved, I mean for traveling purposes, and things like that, but so far as outright improvement in muscular control and coordination, I haven't had much.

Q. Up to October, 1949, did you receive any salary? A. No, sir.

Q. You did not receive any money at all? A. No, sir.

Q. And no maintenance? Is that right? A. That is right.

Mr. Rassner: May I withdraw this witness? I am through with the direct testimony. I am about to call a doctor. I want to lay the foundation for the hypothetical question.

The Court: All right.

Mr. Rassner: Will you step down, please.

(Witness excused temporarily.)

Mr. Rassner: Dr. Frant, will you take the stand, please?

DR. SAMUEL FRANT, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Dr. Frant, are you a duly licensed physician and surgeon of the State of New York? A. Yes, sir, I am.

Q. May we have your qualifications for the record, please? A. I am the First Deputy Commissioner of Health, and I have been in that position for the past seven and a half years, having previously been with the Health Department since 1923.

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I graduated from medical school in 1921, from the College of Physicians and Surgeons, Columbia University, and was in practice and was working part time for the Health Department for about ten years.

I then was made the Chief of the Division of Epidemiology in the Department of Health, and rose to the position of Chief of the Bureau, and then to the Deputy Commissionership, and then to the First Deputy Commissionership, over the years.

In addition to working for the Health Department I am an associate professor of epidemiology in the School of Public Health at Columbia University.

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I have a degree in Public Health from the school of Public Health in Columbia, and have memberships in various organizations concerned with public health.

My specialty in medicine is that branch of public health which is called epidemiology, namely, the study of the causes of the transmission of disease from person to person.

Q. Did you write any book on epidemiology? A. I have written many articles on epidemiology, and a chapter in Brennerman's Practice of Pediatrics.

Q. Are your works standard works in the medical schools of our country? A. Well, they are used.

Q. They have been accepted and used? A. They are accepted, yes, sir.

Q. As standard works? A. Yes, sir.

Mr. Gray: That is objected to as—well, I withdraw the objection.

Q. Have you been called in as a consultant on various epidemics in other parts of the country? A. Yes. I have been to Chicago at the time of the dysentery epidemic.

Q. At whose request and under what circumstances?

A. At the request of the Commissioner of Health in Chicago.

I was in Wilmington, Delaware, when they had the epidemic of diarrhea among new-born babies, at the request of the Commissioner of Health of Delaware.

Q. Have you been in charge of the suppression of epidemics in the City of New York? A. Yes, sir, I have.

Q. Polio epidemics I have particular reference to. A. Yes, sir. I have been in charge of the work in regard to communicable diseases in the City of New York since 1931, when I was called to take care, for the Health Department, of the polio epidemic which developed in that year, and subsequently I have been in charge of the various epidemics, including poliomyelitis in New York City.

Q. Now, Doctor, I wish you would assume the following facts, and I am now reading—

Mr. Gray: May I ask, first, what facts or what particular expert opinion, Mr. Rassner proposes to elicit from this witness, because I am going to claim that he is not qualified to express an opinion on certain phases of the polio subject.

I would like to know what Mr. Rassner intends to prove by this witness, and then I should like to cross-examine the witness on that subject.

Mr. Rassner: I claim that he is an expert on every phase of contagion, the spread of it, and the effect of viruses on the human body—every feature of it.

Mr. Gray: Then I should like to cross-examine him on the subject.

Mr. Rassner: I have no objection to that.

Cross Examination by Mr. Gray:

Q. Doctor, during the ten years that you were engaged in private practice, and also with the City Public Health Service, that is, from— A. 1923—

Q. —to 1933— A. 1931—yes, 1931, it was.

Q. What type of medicine did you practice? A. General practice.

Q. General practice? A. Yes, sir.

Q. Did you specialize in polio at that time? A. In my general practice?

Q. Yes. A. In my private practice?

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Q. Yes. A. No.

Q. How much of your time was devoted to private practice during those ten years and how much to your public duties? A. About half and half.

Q. What was your public title at that time? A. Diagnostician.

Q. With the Public Health Service? A. With the Health Department.

Q. And as such what particular types of disease did you diagnose? A. I consulted with physicians in the city and at the hospitals on the diagnosis of difficult cases, especially poliomyelitis.

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Q. Have you ever treated an acute case of poliomyelitis from start to finish? A. Yes, sir.

Q. How long ago? To the last one you so treated? A. Twenty years ago.

Q. Twenty years ago? A. Yes, sir.

Q. During that time, that is, during the latter twenty years, have there been any advances in the medical knowledge with relation to the treatment of poliomyelitis? A. Yes, sir.

Q. What is one of the articles that you have written, which you say was published? A. Oh, a series of about ten articles on epidemic diarrhea of the new-born, which was first described by me and my colleagues in New York City—epidemic diarrhea of the new-born.

Dr. Samuel Frant—Cross.

Q. Was your colleague a Dr. Boaz? A. No, sir. I wrote an article with Dr. Boaz in 1922, when I was an intern in the Montefiore Hospital. That is thirty-one years ago. That was on capillary blood pressure. That was before I was in the field of public health.

Q. Was your father a doctor? A. No.

Q. Well, I have examined the records in the Academy of Medicine in New York within the last week and the only article which I found, of which one Samuel Frant was the author, is an article that was published in 1898. A. That is the year I was born.

Q. So you did not write that? A. No, sir, I did not write that.

Q. That was with a Dr. Phillip Earnest Boaz? A. No; that was in 1922. The 1898 is my date of birth which the card in the Academy catalogue had.

I might correct something there, or, I might just state, for the Court's information and for your information—the counsellor is in error in going to the catalogue of the Academy of Medicine, because it has in its catalogue only those papers that are in the library of the Academy, as distinguished from the ones that are in the various current and previous journals, and these articles to which I refer, and which led counsel astray are in various magazines, various medical and public health magazines, and naturally they wouldn't be in the catalogue of the Academy.

Q. Well, then this was an article that related to capillary blood pressure? A. In hypertension.

Q. In hypertension? A. High blood pressure.

Q. And you also wrote another one with Dr. Abramson on diarrhea in the new-born? A. That is right. I wrote about fifteen papers with Dr. Abramson on diarrhea.

Q. Now, what articles or works have you read on the subject of poliomyelitis? A. I should say that I have read practically everything that is of value that has been written on the subject of poliomyelitis.

Q. Well, about how many articles would you say they

would total up to? A. There must be, as far as books that I have read on polio, about eight or ten. As far as articles are concerned, I have in my library alone maybe four hundred or five hundred articles on polio.

Actually the number that has been written runs well into the thousands, and I have read abstracts, and kept abreast of the literature on polio about as well as any expert on the subject.

Q. But you have not treated an acute case of polio for at least twenty years? A. That is right.

Q. What was the year in which you treated such a case? A. About 1931.

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Q. And you treated that as a private patient? A. As a private patient.

Q. Have you done any research in epidemiology? A. Oh, yes, sure. All the work on epidemic diarrhea of the newborn that we did; the work that we did on cadmium poisoning, food poisoning, on the effect of gammaglobulin in measles; to say nothing of the other work, has been laboratory research work.

Q. Have you done any laboratory research in epidemiology upon poliomyelitis? A. No, sir.

Q. Do you know Dr. Robert Ward? A. Yes, sir.

Q. Do you look upon him as an authority on polio epidemiology? A. No.

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Q. What are your duties as of today with the City? A. I am responsible for the running of the Department of Health.

Q. Yours is a desk job? A. Desk and outside job. If I want to go out, I go out.

Q. That is, if you want to go out to investigate a particular case, you may do so? A. Surely, or a particular situation.

Q. A particular situation affecting the public health— A. That is right.

Q. —I take it? A. Yes.

Q. When was the last time that you have gone out from

your office to investigate the treatment of a polio case? A. About twenty-five years ago.

Mr. Gray: I object to this witness testifying as to the epidemiology of polio, as not qualified, your Honor.

The Court: Overruled.

Mr. Gray: Exception.

Direct Examination (Resumed) by Mr. Rassner:

287 Q. Now, Doctor, assume the following facts—

And I intend to read from Libellant's Exhibit No. 2—the master's deposition—page 8—

(Reading) "Q. Now, when you were at Shanghai you received orders from the United States Government, to wit, Army personnel, to take certain persons aboard the ship; is that right? A. That is correct.

"Q. And that included Chinese military men; is that correct? A. That is correct.

"Q. Can you tell us approximately how many of those military men you had aboard the ship while the vessel was in Shanghai? A. I would say no more than fifty or no less than forty.

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"Q. You would say between forty and fifty is a fair estimate; is that correct? A. Yes, that is correct.

"Q. You had nothing to do with the maintenance of these army soldiers, did you? A. No.

"Q. And you had nothing to do with their care or their treatment? A. No.

"Q. And you had nothing to do with their physical examinations? A. That is right.

"Q. And you had nothing to do with providing doctors for them; is that right? A. No, that's right.

"Q. You had nothing to do with examining them or having them examined; is that right? A. That's right.

"Q. And, therefore, you did nothing with reference to the examination of these military men? A. That's right.

"Q. All you did was permit them to come aboard the vessel, in accordance with the instructions which you received from the Army? A. Yes.

"Q. Is there anything else you had to do with those men, other than to give them space aboard the ship and transportation? A. Nothing.

"Q. That is all you had to do with them? A. That is all.

"Q. And you had nothing to do with reference to their state of health or illness, did you? A. No.

"Q. That was not any of your orders, either from the Cosmopolitan Shipping Company, Inc., or from the United States Government; is that right? A. That's right.

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"Q. Or from anybody else? A. Well, as far as I know.

"Q. You had no orders? A. No, I had no orders.

"Q. I want to make sure that you had no orders from anybody except to take these men aboard your ship and transport them, in accordance with instructions from the Army. Is that right? A. That's right.

"Q. It was no part of your duties, was it, to have these men examined as to whether they were well or sick? A. No.

"Q. And, specifically, it was not part of your duty to have these men examined by anybody, any doctor or anybody else, in order to find out whether they were suffering from polio or any other disease, that was not part of your duties, was it? A. It was not part of my duties, it was the Army's, as far as I'm concerned.

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"Q. Just answer as far as you know. You do not know whose duty it was? A. No.

"Q. It wasn't yours? A. That's right.

"Q. We are just sticking to what you had to do. It was no part of your duties? A. No.

"Q. And you took no steps with respect to that? A. That's right.

"Q. Whether those men were suffering with polio or what, you did not know? A. That's right.

"Q. And it was no part of your affairs to find out? A. No.

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"Q. Aside from these Army personnel there were Chinese truck drivers, civilian employees, that you were told to take aboard the ship; is that right? A. That's right.

"Q. And about how many of these were there? A. About 25.

"Q. Now, you took these men aboard your ship also under orders from the Army; is that right? A. That's right.

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"Q. And you had no instructions as to them, other than these instructions which you received as to the Army personnel; is that right? A. That's right.

"Q. Is that correct? A. That is correct.

"Q. Now, did you also have mechanics? A. Well, the mechanics were with the same bunch.

"Q. About how many mechanics were there? A. The same amount, about 25.

"Q. And the same would hold true if I put the same questions to you as I put to you about the Army, about the truck drivers, the answer would be the same with reference to the 25 or so mechanics; is that right? A. I should think so, yes."

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I am going to skip a few sentences, and I will go back to the direct examination in this deposition, starting at the bottom of page 4.

(Reading) "Q. Were any arrangements made for preventing these soldiers, the Chinese soldiers, and, also, the truck drivers, from using the ship's regular toilet facilities? A. Just say that again, please."

The question was read again.

(Reading) "A. Well, no arrangements were made. That was up to the officers, to keep them out of their quarters, that is all.

"Q. Did you have any notice posted on board ship warning the members of the crew of the Haines about various diseases that might be contracted ashore? A. Yes.

"Q. Was that a standing order or was it just put on particularly for the Chinese coast? A. A standing order.

“Q. And was that notice on throughout the whole voyage? In other words, when was the notice posted, as soon as you left New York or later on in the voyage? A. It was posted in all the tropical climates down there, Hong Kong, Singapore, and so on.

“Q. Did you have any information that there was any polio ashore at Shanghai or at any other Chinese port? A. Well, we were warned it was all over there.

“Q. You were warned it was all over in the tropics? A. Yes, in China and all through the tropics.

“Q. When did you get these warnings and where did the warnings come from?”

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There was some colloquy at this point, and then—

(Reading) “The Witness: That comes from the Government; that is posted to you in the mail from the Government. The Government ships puts that out, you know, and you have got to post it up.

“Q. On the bulletin board? A. Yes.

“Mr. Rassner: And you said you did, you did post it?

“The Witness: Yes, sure.”

Now, under those circumstances, Doctor, would such procedure, that is, taking these men aboard the ship when there was knowledge of polio ashore, be a competent, producing cause of spreading the contagion of polio? 297

Mr. Gray: That is objected to as being an improper so-called hypothetical question, and no proper foundation has been laid for the witness's opinion.

The Court: I will take it. Overruled.

Q. Yes or no? A. Was the bringing of these men on board the ship a competent, producing cause of spreading—

Q. Of spreading polio. A. Yes.

Q. And in your opinion is that how the polio was spread to Mr. McAllister? A. Yes.

Q. Now, is there any established practice in the treatment of polio in its incipient stages?

Mr. Gray: That is objected to.

The Court: At this time?

Mr. Rassner: Yes.

The Court: At this time that we are talking about?

Mr. Rassner: Yes, in 1945.

Mr. Gray: I object on the ground that the witness is not qualified.

The Court: I will allow it.

If he knows.

A. Yes.

Q. Was that in general usage and general knowledge throughout the world, or was it different in different countries?

Mr. Gray: That is objected to on the ground that the witness is not qualified to testify to what went on at any other place than New York, Chicago, and Delaware.

Mr. Rassner: I will take it as to New York, Chicago, and Delaware.

Mr. Gray: I object to it as immaterial, because we are speaking now with respect to the Chinese coast.

Mr. Rassner: I withdraw the question.

Q. Was there a general practice followed by the medical profession as a whole in the treatment of polio?

Mr. Gray: Where?

I object to it unless the area is given.

The Court: At the time in question?

Mr. Rassner: At the time in question.

Mr. Gray: And the area.

The Court: Yes.

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Mr. Gray: It is objected to because the area has not been stated in the question.

Mr. Rassner: Then may I preface the question with this—

The Court: Yes, if he knows—

Q. Is there any difference as to where the area was? Is there any difference in treatment? Does that make any difference? A. No.

Mr. Gray: I object to that. He wasn't qualified as to that.

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Mr. Rassner: The Court said that he was qualified, Mr. Gray.

Mr. Gray: I object to this particular question. The Court hasn't ruled on it. My particular objection is—

The Court: He is talking about how it is treated in China?

Mr. Rassner: I asked him whether it made any difference as to the treatment of polio, and he said no, and therefore I say now—

The Court: Before we get to that—does he know anything about China, at the time—

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Mr. Rassner: I had him assume, upon the master's deposition—

The Court: I am asking him.

Do you know anything about China at the time we are talking about?

That is 1945, isn't it?

Mr. Rassner: That is right.

The Court: About the polio epidemic there?

Mr. Rassner: Well, I don't think—

The Court: Was there a polio epidemic there?

Mr. Rassner: The master so testified. I just read that.

Mr. Gray: The master did not say that there was a polio epidemic. He said there was polio ashore.

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It is well known that there is polio all over the world, including up among the Eskimos.

The Court: Let's get that straightened out.

Do you know anything about it as of 1945, up there?

The Witness: If you are asking specifically, do I know whether there was an epidemic of polio there, your Honor, I don't.

The Court: You don't know?

The Witness (Continuing): But I do know very definitely what the established practice and treatment of polio is, whether it is in China or anywhere else.

The Court: In 1945?

The Witness: In 1945.

The Court: I will allow it. Overruled.

Go ahead.

I am giving you an exception, Mr. Gray.

Mr. Gray: Thank you.

Q. Will you please tell us, Doctor—

The Court: Did you ask him what it was?

Mr. Rassner: Yes.

Q. What was it? A. What has now been called pretty generally the Kenny treatment; namely, the use of moist wet heat—moist heat—and the re-education of muscles.

Q. Will you explain the purpose of that type of treatment, and what does it do for the patient? A. It first of all soothes the spasm which is one of the important symptoms of the disease, and puts the muscles to rest instead of having them subject to the stresses and strains of the disease.

And, secondly, it enables the pattern of normal muscle balance to be regained.

Q. What is the effect of the failure to institute that type of treatment?

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Mr. Gray: That is objected to. The witness has not been qualified.

The Court: I will allow it. Go ahead.

A. Failure to institute early treatment in poliomyelitis may—

Mr. Gray: That is objected to as not responsive. He doesn't say treatment with the Kenny method. That is the subject—

Mr. Rassner: That is not my question.

The Court: Well, I can draw my own conclusions here.

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Go ahead.

I will allow it.

A. (Continuing) Failure to use the proper method in the early treatment of poliomyelitis may lead to widespread degeneration and atrophy of the muscles.

The Court: And do you know what polio is?

The Witness: Yes, sir.

The Court: What is it?

The Witness: Polio is a disease of the central nervous system caused by a very small germ called a virus.

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The Court: Is it carried in the air?

The Witness: No. It is carried by human beings who have the organism either in their intestinal tract or in their nose and throat.

The Court: All right.

Q. Now, did you examine Mr. McAllister? A. Yes, sir.

Q. How many times? A. Twice. Once recently.

Q. Well, you examined him once before, when you testified in the previous case? A. Yes.

Q. (Continuing) Involving Mr. McAllister; is that right? A. Yes.

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Q. And then you examined him again— A. A week ago.

Q. A week ago? A. Yes.

Q. Will you please tell his Honor what the extent of your examination was, and what your findings were? A. May I refer to my notes?

Mr. Rassner: Yes.

Mr. Gray: This is the last examination, or the first one?

The Witness: The last.

(After referring to papers) On January 6, 1953, I examined Mr. Robert A. McAllister and found him to be almost completely paralyzed in his lower limbs, both legs and thighs, and also paralyzed to about 25 per cent in his left arm.

He is unable to walk without two crutches.

He is unable to stand without one crutch.

Without crutches he cannot either stand or walk.

He can move the left leg to maybe 10 per cent of normal activity.

He can move the right leg perhaps to 20 per cent of normal activity.

He has about two-thirds of the normal movement of the left arm.

He has extreme wasting of the left buttock and the left thigh, so that the thigh is perhaps a quarter to one-third as large as it should normally be—let's say one-third to one-half as large as it should normally be. And he has about one-third wasting and atrophy of the right thigh.

He also has some wasting of the left shoulder muscles, both in the front and in the back, and some wasting of the muscles of the upper arm on the left side.

Q. How do these conditions compare to your previous examination? A. I haven't a clear recollection of the last

examination, but he was pretty badly incapacitated at the last examination also.

Q. Doctor, is delay of treatment from the time that pain in the neck is felt, and agitation of the limbs, hot throat, and a feeling of warmth throughout the body, for a period of a week to ten days, a competent, producing cause of aggravating a condition of polio?

Mr. Gray: That is objected to. The witness is not qualified.

The Court: I will allow it.

Mr. Gray: Exception.

A. Yes.

Q. In your opinion was the delay as described by Mr. McAllister in your presence a few moments ago the cause for an aggravation of his condition?

Mr. Gray: That is objected to as to indefinite. Let's get the delay in hours or days, to which the witness can refer.

Mr. Rassner: May I have an answer to my question as I put it?

The Court: Yes. I will allow it.

Q. Yes or no?

The Court: Do you understand the question, Doctor?

The Witness: Was the delay competent to produce the—

Q. The aggravation. A. —the aggravation?

Q. Yes, sir. A. Yes.

Q. Now, will you tell his Honor, with a reasonable degree of medical certainty what effect in your opinion the delay had on Mr. McAllister?

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Mr. Gray: The same objection.

The Court: I will allow it.

A. It is pretty obvious that from a medical standpoint an individual who is suffering from the symptoms such as Mr. McAllister described should receive prompt and adequate medical treatment.

Mr. Gray: I object to that and ask to have it stricken out as not responsive, and argumentative.

The Court: I will allow it. Go ahead.

A. (Continuing) Knowing now the diagnosis of infantile paralysis, or polio, in Mr. McAllister, it was highly important that he should have received, from the very first time he had any symptoms, the best possible medical treatment, for several reasons:

One, because he was in immediate danger all the time, from the beginning of his disease until about two weeks after the first time he got his symptoms—he was in imminent danger of becoming a bulbar polio case. He already showed signs of bulbar polio. That is the very severe form of infantile paralysis, which in many instances causes patients to have to be put into a respirator on a moment's notice.

He had difficulty in swallowing.

He had pain in the face.

He had—let me consult my notes a minute—

(After referring to papers) He was unable to bite, and he had quite a severe stiff neck.

All of those symptoms indicated the imminence of bulbar polio, and the necessity for having very, very prompt treatment.

Now, if he had had that prompt treatment he probably would have suffered much less from the sequellae of polio than he does now.

Q. When you say probably, is that a statement with a

reasonable degree of medical certainty, as your opinion?

A. Yes, sir.

Q. Now, Doctor, is the disease of polio easily recognizable? A. Yes, I think it is.

Q. And was it in 1945? A. Oh, yes.

Q. And could it be recognized easily by any person trained in medicine, and in giving first aid, such as a mate or a captain? A. Yes, sir—I beg your pardon?

Q. Could it be recognized easily by any person trained in medicine and in giving first aid, such as a mate or a captain who is trained to give first aid to men at sea and men on ships?

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Mr. Gray: That is objected to. The witness is not qualified to testify to what training is given to mates and captains on ships.

Mr. Rassner: They are supposed to have first aid training.

Q. Would you say that any person having any knowledge of first aid would be able to recognize that the man is in need of medical training and supervision? A. I would like to have the question again, because there is a difference in the answer depending on whether you say it the first way or—

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Q. Well, let's assume that a layman sees a man lying in bed, confined to bed, unable to work, having difficulty in breathing, feeling hot although the temperature seems to be normal, having difficulty in breathing, having a stiff neck, and spasms of the arms and legs; will you say that it was good or bad practice for a layman to undertake to take care of such a person without getting professional advice from a doctor.

Mr. Gray: That is objected to. The witness is not qualified, and it is too general.

The Court: You can't answer that, can you Doctor?

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The Witness: Oh, I can answer that very definitely.

Any person in a responsible position, who has been trained to know the difference between somebody who is sick and not sick, even with a very superficial training should know enough to be able to tell when he has a seriously sick person, and this individual was a seriously sick person.

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Mr. Gray: That is objected to, and I ask to have it stricken out. When he says seriously sick he doesn't give us the symptoms and the condition of the patient.

The Court: Well, I will let the answer stand.

Q. Do you think, under such circumstances, that it was good or bad practice for the ship's officers to permit Mr. McAllister to stay in his bunk for upwards of one week without any medical advice?

Mr. Gray: That is objected to on the same grounds.

The Court: I will allow it.

324 A. It was very bad practice.

Q. Now, Doctor, is it your opinion that the delay in treatment of a week to ten days was a competent producing cause of aggravating Mr. McAllister's condition?

Mr. Gray: That is objected to unless the dates appear of the week or ten days that Mr. Rassner has in mind.

Mr. Rassner: Preceding December 1, 1945.

The Witness: The question was, was that—

Q. Was that a competent producing cause, in your opinion, and with a reasonable degree of medical certainty? A. Yes.

Q. And is that your opinion? A. Yes.

Q. Is this condition permanent, that Mr. McAllister has, Doctor? A. Yes, sir.

Mr. Rassner: Your witness.

Mr. Gray: Without waiving my objections as to the incompetency of the witness—

The Court: Oh, certainly.

Cross Examination by Mr. Gray:

Q. Doctor, I show you three sheets—four sheets—which I ask to have marked for identification—

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(The four sheets referred to were marked Respondent's Exhibit C for Identification.)

Q. (Continuing) —being a report from Dr. John C. McCauley, Jr. of 49 East 78th Street, New York City—

Mr. Rassner: May I ask if he is going to be called as a witness?

Mr. Gray: If you desire it I will call him as a witness.

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Mr. Rassner: I am not going to consent to any reports going into evidence unless I can cross examine the doctor.

Mr. Gray: I will bring him in, certainly—

The Court: How do you want to fix it? You say you are going to call him?

Mr. Gray: If you insist on it.

Mr. Rassner: May I have a copy of that?

Mr. Gray: You have a copy. I gave it to you two days ago.

Mr. Rassner: May I look over your shoulder for a second?

Mr. Gray: I am going to show it to the doctor.

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Mr. Rassner: Maybe I am going to consent to its going in evidence, and you may not have to call him as a witness.

Mr. Gray: I will show it to the doctor.

Mr. Rassner: I object to Mr. Gray reading from anything that is not in evidence.

Mr. Gray: I am not going to read it. If you will wait, you will see.

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Q. Doctor, I show you a paper consisting of four sheets, which has been marked Respondent's Exhibit C for Identification, being a medical report on Mr. Robert A. McAllister, made on January 6, 1953—that is, a report of a physical examination made on January 6, 1953, and I ask you to read it and state if you disagree with any of the statements in that report.

Mr. Rassner: I object to that. That is improper cross examination. It is not in evidence. He is giving him a paper and asking him about something that is not in evidence.

The Court: It has not been offered in evidence yet. He is only asking the doctor to read it.

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Mr. Rassner: Yes, but he is also asking him to state whether he agrees or not with part of it. It is the second part of the question that I object to.

The Court: Well, we will suspend the second part until the doctor has read it.

Q. Will you read it, please, Doctor (handing paper to witness). A. Yes.

Q. By the way, you examined Mr. McAllister also on the 6th of January, 1953, did you not, Doctor? A. That is right.

Q. The same day as that examination? A. That is right.

(The witness proceeded to read the paper.)

Q. Have you finished reading it, Doctor? A. Yes, sir.

Q. Do you disagree with that report in any respect? A. Except on—let me put it another way: I think the report is a very carefully, well-written document, showing substantially the same findings that in summary I did as a result of my examination.

The one thing that I object to in the report is that there is emphasis laid on the fact that Mr. McAllister has been able to make a very, very good adjustment to life.

There is a tendency in the report to minimize the fact that he just doesn't have any lower legs, lower limbs.

I can't quarrel with Mr. McAllister's making use, to the great extent that he has, of his hands and his crutches, but he still doesn't have any lower legs—he hasn't any legs—and therefore to that extent he is tremendously disabled by this disease.

Q. Well, is the result of your examination with respect to his physical condition substantially in accord with that of Dr. McCauley? A. Oh, yes. There is no question about it. Substantially.

Mr. Rassner: I have no objection to the report going in evidence. I am not consenting to the truth of it, but I will consent to its going in to obviate the need of calling the doctor.

Mr. Gray: All right, I offer it in evidence.

Mr. Rassner: No objection.

(Defendant's Exhibit C for Identification was received in evidence and so marked.)

Q. Doctor, when you made your physical examination of Mr. McAllister did you use any apparatus? A. No, sir.

Q. Where was your physical examination held? A. In my office.

Q. Where is your office? A. 790 Riverside Drive.

Q. Are you now in private practice? A. I have one or two patients.

Q. How many physical examinations have you made of polio victims within the last five years? A. Half a dozen.

Q. Now, when you speak of Mr. McAllister having difficulty with his bite, biting, and stiff neck, you relate that to a bulbar infection, do you not? A. To the possibility of a bulbar infection, yes.

Q. And isn't it true that bulbar infections, except where the respiratory muscles are involved, almost invariably cure themselves? A. I wouldn't say that.

Q. What would you say about it? A. I would say that the diagnosis of bulbar polio is probably one of the most serious diagnoses that you can possibly make.

Q. But I asked you, Doctor, whether bulbar involvement, other than that also involving the respiratory muscles, usually clears up itself? A. Yes, I suppose if you don't involve the respiratory muscles, but you don't know when you have your bulbar polio whether in the next ten minutes it isn't going to hit the respiratory center.

Q. Did you find any evidence that Mr. McAllister had any trouble with his diaphragm muscles? A. At the examination a week ago?

Q. Yes. A. No.

Q. And it is the diaphragm muscles that relate to your breathing, is it not? A. Oh, no.

Q. What other muscles — A. The muscles of your chest.

Q. The intercostals? A. That is right, and your neck muscles.

Q. What neck muscles? A. The tremendous muscles that raise and lower the chest, the deltoid, the trepezius, the scalenus muscle, the latissimus dorsi muscle — the whole group of the so-called deep muscles of the neck which control the fundamental type of respiration that is carried on.

Q. Whether the diaphragm is affected or not? A. Well, the diaphragm, after all, doesn't do anything except respond to the effect of these muscles on the chest.

Q. Then is it true, Doctor, that your opinion as to the necessity for immediate care of the patient, the care of a

physician, is based upon the appearance of these two symptoms? A. Which two symptoms?

Q. Upon the appearance of difficulty with biting, and a stiff neck. A. Oh, no; oh, no.

Q. What symptoms, if any, did you base your opinion upon as to the necessity for immediate medical care? A. In his particular case?

Q. Yes. A. In his particular case it was the stiff neck, the temperature, the nausea, the feeling of weakness, and the fact that he could not bite.

Q. And until that condition came into existence there was nothing in any previous condition, such as dizziness, which would direct your attention to polio? A. Well, you are asking does a doctor think that a patient that has some symptoms — does a doctor think that a patient that has some symptoms should be treated by a doctor? Of course the doctor is going to answer yes. If you have any symptoms you ought to be looked at by a doctor, and it is of the best possible care that you should get the doctor to look at you quickly. So the answer to your question would be, if he complained of dizziness I would say that that was when he should have had a doctor.

Q. And if dizziness was the first symptom which he experienced, that would be the time, the first time, that the necessity for medical consultation would arise, would it not? A. It might be the dizziness, depending upon how severe the dizziness was.

Q. You wouldn't expect a person to consult a doctor until he had a symptom, would you? A. Some people do. Some people —

Q. Before they have a symptom? A. Yes. That is known as preventive medicine; periodical health examinations; thousands of them are being done. You know that —

Q. That is only preventive medicine, but that wouldn't be a consultation for a specific malady. A. No; if you have no malady, no symptoms of a malady, or signs of a specific

malady, then you could not consult the doctor for the malady.

Q. Certainly. Now, you have also spoken about spasm. What has been your experience as to the relationship of spasm to the acute poliomyelitis? A. Spasm is one of the earliest signs of acute polio.

Q. What is an earlier sign than spasm? A. Temperature.

341 Q. In the absence of temperature, and in the absence of spasm, in your opinion would there be sufficient symptoms to indicate to any doctor that the patient had polio? A. Oh, sure.

Q. What other symptoms would you look for? A. You might possibly find—and this is not an infrequent occurrence—you might possibly see a patient that has awakened in the morning and can't move his arm. That would be the first symptom of polio.

Q. That would be paralysis. A. Yes.

Q. Paralysis might be the first symptom? A. As a matter of fact it was very often the first symptom in the 1916 epidemic.

342 Q. But Mr. McAllister did not report any such symptom to you, did he, in your examination? A. No. In the history that Mr. McAllister gave me he was not, as a first symptom, paralyzed.

Q. What was the first symptom that Mr. McAllister gave you as the onset of the disease? A. The inability—may I refer to my notes again?

(Witness refers to papers) The inability to bite, and then—

Q. Did he tell you about any previous dizziness? A. No. The first symptom that he gave me a week ago was that on or about November 15th he was unable to bite, and then in two or three days he became very, very anorexic. That means that he had no appetite at all. He had nausea,

and was compelled to go to bed at that time, having a temperature also.

Q. You mean he actually had a temperature, or he just felt one with no temperature? A. He said to me that he had a temperature.

Q. And this was on the 15th of November? A. The 15th was when he had the inability to bite, and two or three days later, on the 17th or 18th, he was sick enough so that he had to go to bed.

Q. Well, in your experience would you say that that condition was what you might call the prodromal condition or the preparalytic condition? A. A preparalytic condition.

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Q. Now, a preparalytic condition continues for how long normally before it reaches its peak? A. What do you mean by peak, Mr. Gray? What do you mean by the peak?

Q. The peak of acute paralysis — of acute polio, I mean. A. I mean, you are asking how long do you have these premonitory symptoms before you get paralysis?

Q. Before you get paralysis. A. Yes. What is the average length of time?

Q. Yes. A. That varies from a few hours to all the time that the man is sick, if he never gets paralyzed. In other words, you can have these symptoms for a few hours, for a day, for two days, for three or four days — four days the most — and then you get paralyzed, or you begin to get better.

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Q. So, therefore, having experienced this difficulty with the biting, you would expect him to reach a condition of paralysis within four days, or start to get better thereafter? A. Yes. Within varying limits. I mean it can be longer or shorter.

Q. Well, within limits — four, five, or six days? How many days? A. I suppose the top limits would be eight days. The dromedary type of polio, when you are sick. Then you get a lot better, and then get sick again after

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three or four days intervene. It doesn't go much more than ten days altogether.

Q. Now, isn't it true, Doctor, that there are no epidemics of polio in the Far East? A. That is not true at all.

Q. I beg your pardon? A. That is not true at all.

Q. Not at all? A. Not at all.

Q. Did you attend the First International Poliomyelitis Conference here in the Waldorf Astoria in 1948? A. No, I did not attend it.

Q. Did you know that during that conference Dr. Robert Ward was one of the panel members on the question of epidemiology?

Mr. Rassner: That is objected to. The doctor said that he did not attend. He shouldn't be questioned any further about what others did somewhere where he didn't attend.

Mr. Gray: I asked him if he knew it.

Mr. Rassner: It is getting it in indirectly—telling the Court that Dr. Ward was in that conference.

Mr. Gray: I will withdraw that.

The Court: It is withdrawn.

Q. Now, how many stages of polio are usually recognized in the clinical course? A. I don't know.

Q. Have you ever heard of any? A. Well, recognized by whom?

Q. By the medical profession. A. Well, there are lots of people in the medical profession. If you want me to describe polio I will describe it. If you want me to name the stages, I will name them.

Q. What is usually the first stage? A. The first stage usually is invasion, fever, and the early symptoms—well, let's say that would be one stage.

Q. What are those early symptoms? A. Stiff neck, spasms of the muscles, pains in the joints, sore throat, maybe diarrhea.

Q. Is that what you would call the preparalytic stage?
A. Yes.

Q. And that is the stage that you say may last for one to seven days? A. Yes. It varies. It may not be present at all, and it may last from four to seven days.

Q. And then the paralytic stage? A. Yes, the paralytic stage, or the stage of recovery, depending on whether the individual goes on to paralysis or not.

Q. If he doesn't go on to paralysis, that is known as an abortive case, isn't it? A. Yes, the whole thing is abortive. It is known as a nonparalytic case now.

Q. So that in your experience the paralytic stage starts about from—if there is a paralytic stage it starts from four to seven days after the onset? A. No. It may be the first. Remember the people that woke up with their arms paralyzed?

Q. Yes. A. So that it may be—

Q. But not more than seven days after the onset? A. Oh, no, I wouldn't say that, because the dromidary type can take ten days.

Q. Can take ten days? A. Yes.

Q. Then your testimony is that the paralytic stage starts about from one to ten days after the onset of the disease? A. The onset of the symptoms.

Q. The onset of the symptoms? A. Yes.

Q. That is, from the first symptom you would expect paralysis or no paralysis within ten days? A. Yes.

Q. Now, with respect to the existence of poliomyelitis in China, will you state whether or not this, which I am about to read to you, meets with your experience—

Mr. Rassner: That is objected to. I object to counsel reading from anything that is not in evidence.

Mr. Gray: Oh, I can ask this witness a question.

Mr. Rassner: Only if the Court overrules my objection.

I object to counsel reading and trying to get into the record some excerpt from a document which is not in evidence, and which may not be admissible in evidence. I can't cross examine the book.

The Court: As I heard the question it was asking the Doctor if he knew of certain conditions in China.

Mr. Rassner: Which he is about to read of.

The Court: Well, no, he is not reading anything yet.

Mr. Rassner: That is what he said he was going to do, your Honor, sir. That is why I objected to it. I object to his reading.

The Court: You don't have to put that in evidence.

You can ask him the questions, can't you?

Mr. Gray: Yes, I can do it.

The Court: Well, why not do it that way?

Q. Doctor, are you familiar at all with the overcrowded, unhygienic communities in China, India, and the Philippines? A. I am familiar with the fact that there is general agreement that such conditions do exist.

Q. Is it not true that paralytic poliomyelitis is relatively rare and sporadic rather than epidemic in those regions of the world? A. No, it is not true. Whatever—wherever people have investigated the existence of infantile paralysis, polio, we have found that there are many cases of the disease.

Q. All over the world? A. All over the world.

Q. I am talking now about endemic or sporadic cases rather than epidemics. A. That is what I am talking about too.

Q. You mean to say that epidemics of polio are common in the Far East? A. That isn't what you asked. You said sporadic cases. As a matter of fact epidemics of polio are now common in the Far East.

Q. I asked you, Doctor, about paralytic epidemics of

polio. A. No. You asked me—well, I don't know what you asked me. I can't remember it any more. I mean I made a distinction in my mind. If you want me to I will be glad to answer it in any way you want it if you will repeat it for me.

Q. Is it not true, Doctor, that paralytic polio is rather sporadic and endemic in China than epidemic? A. At the present time I don't think so. I think that within recent years infantile paralysis is epidemic at various times in the Far East.

Q. You mean paralytic or abortive? A. Well, of course I mean paralytic, because you don't have any epidemic of polio, except in very rare instances, where there are not an appreciable number of paralytic cases.

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Q. And that is the extent of your knowledge of conditions in the Far East as to paralytic polio and the existence of polio? Is that true? A. The extent? No. I have some more facts about polio in the Far East.

Q. Let's hear them, please, Doctor. A. What would you like to hear?

Q. As to China.

Mr. Rassner: I object to any general discussion of what he does know. That is not a question that—

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Mr. Gray: This is cross-examination.

Mr. Rassner: I object to the form of the question, and I object to reference—

The Court: That question isn't properly put.

The Doctor is trying to answer your questions. Go ahead and ask him another question.

Q. Is it not true, Doctor, that your experience is spread generally over infectious diseases of the virus type? A. No; not of the virus type.

Q. Well, infectious diseases generally such as diarrhea and virus diseases? A. No, that isn't true.

Q. Do you wish the Court to understand that you specialized in polio? A. Not only do I want the Court to

understand that I specialized in polio, but I did. I know polio the way very few people in the world know it, and it happens to be of particular interest to me because I was brought in from the field to do full-time work because there was an epidemic of polio.

Q. And what was the full-time work that you did? A. I was put in charge of the polio epidemic in 1931 in New York City.

Q. And what did you do after you were in charge? What was the type of work that you did? You sat at an office desk and got reports? A. Well, I wouldn't say that an executive that is in charge of an epidemic sits and gets reports. I mean the whole way in which the city responds to the epidemic is in his hands, and if I may just digress and talk about the smallpox epidemic, if I just sat in the office when we had the smallpox epidemic scare and got reports, well, we would still have a smallpox epidemic, so any belittling of sitting in the office as an administrator is rather far fetched here. I mean somebody has to run the show. I mean you might just as well say that all that the judge is doing here is sitting and rocking in his chair. I sort of resent the fact that there is an attempt made to belittle what, after all, is a rather important job in the city, and in the world.

Q. Well, will you please tell us, Doctor, what you did do, if you did not sit in a chair and receive reports? A. Well, we planned out the campaign of how best to take care of the diagnosis and treatment of all the 4,000 children that finally got the disease, and we decided on how the patients should be visited—that every one of them should be visited by a doctor, and then by a nurse, so that maximum treatment, maximum effective treatment, would be rendered to those children.

We arranged for the hospitalization of those children.

We went, including myself, with other competent people, in the field, from the State and Federal levels to the various hospitals of the city, first of all to make diagnoses on

maybe forty or fifty children then present in the hospitals to determine whether we had polio in our midst.

Q. Did you make such diagnosis? A. Yes, sir.

Q. Did you make such diagnosis yourself? A. Yes, sure.

Q. You made such a diagnosis yourself? A. Yes. This was in July of 1931, in that bad epidemic. And that is all in accordance with the way in which a competent public health official directs the campaign against a particular disease. If you don't know what you have got, and you are not competent to tell what you have got, you can't sit at a desk and receive the reports, because, I mean, you don't know what they mean. So that that was a little bit of how we directed the campaign against polio.

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Q. Well, for the last twenty years? A. That is what I have been doing for the last twenty years.

Q. Directing the campaign against polio? A. Against all those diseases.

Q. All infectious diseases? A. That is right, yes, sir.

Q. And you received reports from the field? A. I sure do.

Q. And they come to you in the regular course of business, and cross your desk? A. That is right, yes, sir.

Q. That is the way you keep in touch with what is going on in the field? A. That is one of the ways.

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Q. But you don't go out yourself and diagnose various cases. You rely upon the diagnoses of your various doctors in the field; is that so, Doctor? A. That is right. I have done it for ten years. I sort of didn't have to do it any more.

Q. Now, when you said, Doctor, that in your opinion the competent, producing cause of polio in this libellant was contact with Chinese coolies and persons who came aboard the ship, what did you have in mind as to the method of contact and transmittal of the disease from one individual to another? Do you know how that is done? A. How polio is spread?

Q. Yes. A. It is usually spread from people who are carriers of the disease to well persons who are susceptible.

Q. What is the etiology of the spread— A. You don't mean etiology. Etiology means cause.

Q. Let's get to the cause. What is the cause? A. The cause is virus, as I told you.

Q. And how does the virus affect the individual? A. It causes the disease. It enters either the respiratory or gastro intestinal tract, and then is carried to the central nervous system, where it attacks the anterior horn cells of the spinal cord.

365 Q. What do you call those anterior horns. The neurons? A. They are the body of the neurons, yes.

Q. And they are the means of transmitting motor impulses from the brain to the muscles? A. They are not the means. They are the actual mechanism whereby the impulse from the brain goes out to the muscle.

Q. Do you know of any remedy or any treatment which affects the effect of the virus on these neurons? A. You mean do I know whether hot packs make the neuron get better?

366 Q. Yes. A. I don't know, nor does anybody else. All I know is that we do use hot packs very early in the disease, and they do some good.

Q. You use the hot packs, you mean, as a matter of giving the patient comfort and relief from the pain? A. And relieve the spasm, and there is a good deal of evidence to indicate that the spasm has a relationship to the severity of the disease.

Q. And what is the relationship to which you refer now? Nobody knows, does he? A. That is right. I don't know, and nobody knows.

Q. And is it not true that the severity of the attack of the virus upon the anterior horns results in a greater or lesser weakness in the corresponding muscle? A. Depending upon how much virus gets in.

Q. Yes. A. Yes.

Q. And after the virus has spent itself, is it then not a matter of the intrinsic vitality of the patient and the number of neurons which are either healthy or only partially disabled, as to his return to normalcy? A. I don't know whether that is so. You are deep, now, in the theory of how polio develops. I don't think anybody knows. We have a lot of theories about it, and if you want to develop the fact that we shouldn't give any treatment to cases of polio—I mean I just don't believe it. I mean I would give treatment to cases of polio. I mean I would do the best I could to try to prevent that thing from spreading, from spreading any more.

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Q. Do you know how it is spread? A. Do we know how it is spread?

Q. Yes. A. It goes from—

Q. In the body? A. In the body?

Q. Yes, in the body. A. Sure. It goes from nerve cell to nerve cell in the central nervous system.

Q. How does it get to the nerve cells? A. Probably through the blood stream, after it has invaded the body through the respiratory or gastro intestinal tract.

Q. Is that your theory, that the virus is communicated from the various parts of the body by the blood stream? A. That is one of the accepted theories. The virus may possibly go up the nerve trunks themselves. I mean, nobody knows about that.

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Q. It is also true, is it not, Doctor, that it is impossible to ascertain whether a person is a carrier of polio? A. Oh, that is not true at all. All you have to do is examine his stool, or examine the secretions of his nose and throat and you will find the virus.

Q. Isn't that a very complicated and expensive— A. Sure, but you can find out.

Q. —and long drawn out procedure? A. It is, yes.

Q. Would you recommend that for the examination of coolies that come aboard a ship to discharge cargo? A. No, sir.

The Court: A cure has not been found for it yet?

The Witness: No, sir. Unfortunately, judge, we haven't found one.

Q. It is also true, is it not, Doctor, that there has been no proof that the polio virus is communicated through sewage? A. I wouldn't say that. I don't know. I suppose there has been no proof. No person has actually been—the crucial experiment has never been performed, of giving an individual sewage and have him develop polio.

Q. And you know of no instance where polio has been contracted through sewage? A. I don't know how you would know of an instance, Mr. Gray.

Q. How many types of polio virus are now known? A. According to one group of investigators there are three types.

Q. Now, Doctor, you stated it as your opinion that the association of Mr. McAllister with various Chinese coolies and other personnel on the Haines was a competent producing cause of his polio disease. Now, upon what facts do you base that opinion? A. Well, polio usually doesn't occur unless there have been previous cases of polio, or contact with individuals who have been in contact with cases of polio, and Mr. McAllister had a rather uneventful voyage with individuals who over a period of months had no polio, and then he suddenly comes in contact with an environment in which there certainly must have been polio, whether the captain thought so or not, and within the normal incubation period of the disease he comes down with the disease.

Q. Might it not have been possible for Mr. McAllister to have contracted the disease while he was ashore in Shanghai? A. From my understanding of the dates, it was more than two and a half weeks, and the length of the incubation—since he had been ashore at Shanghai—his incubation period is about two weeks maximum.

Q. Assuming that he had been ashore at Shanghai be-

tween the 10th of October and the 1st of November, would it have been possible, in your opinion, for him to have contracted the disease then, ashore, in Shanghai? A. Well, the only time would be the very last days of October. I mean you have to give me a maximum—I don't mean that—the maximum incubation period of polio is about two and a half weeks; that is, about eighteen days.

Q. Doesn't it run also as much as thirty-five days? A. I don't know. I don't think so. Of course, the incubation period of polio is a puzzle to us anyway, because we are not sure of where an individual gets his disease, so we can't tell what the incubation period is, but it is generally assumed to be, from the evidence that we have, about two weeks.

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Q. About two and a half weeks? A. Two weeks.

Q. From two to two and a half weeks? A. No. From seven to fourteen days. A maximum of two and a half weeks.

Q. Do you know of any periods greater than fourteen days, where a person has contracted polio from exposure to a source? A. I don't know of any. Otherwise we would have pulled the incubation period over to a longer duration. In other words, if there were cases where we could be sure that polio was contracted within thirty-five days, then we would say that the incubation period is from seven to thirty-five days.

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Q. Did you ever hear of an instance, particularly in the winter of 1948 and 1949, where polio was contracted in an Eskimo village near the Arctic Circle? A. That is right.

Q. Which had no communication with the outside world? A. Well, there is a question whether it had no communication with the outside world. There was communication with the outside world.

Q. Did you ever hear of that incident? A. I heard of the outbreak. Yes, I heard of the outbreak.

Q. It was a very fatal one too, was it not? A. Yes, it was very serious.

Dr. Samuel Frant—Cross.

Mr. Gray: That is all.

Mr. Rassner: Just one question—

The Court: They never isolated the germ itself?

The Witness: Oh, yes, your Honor. That is a very widespread misconception. As far back as 1909 it was one of the great discoveries, and it was an American discovery—they isolated the virus of polio. It was one of the biggest discoveries we ever had, and yet it hasn't done us any good from 1909 until today.

The Court: You still don't know—

The Witness: It is just one of the mysteries about the disease, but we have the germ. Many people think that if you only had the germ you could solve the thing. Well, we have the germ, but we haven't solved the thing yet. We will solve it.

The Court: You have the germ—

The Witness: Ever since 1909. We can get you a test tube, and you can look at it and see the germ there, but that doesn't help yet.

Mr. Gray: It has only been seen in the ultra—

The Witness: Ultra microscope—the electronic. The electronic microscope.

Mr. Gray: Yes.

The Witness: Because it is so small.

Mr. Gray: And that is only within recent years.

The Witness: We don't have the electronic microscope—well, yes, but we don't have to see it to know the effects.

The Court: But are we making progress?

The Witness: Oh, yes, tremendous progress, your Honor. There is every indication that maybe within the next couple of years we will have a vaccine.

Re-direct Examination by Mr. Rassner:

Q. Just one question, Doctor.

You agree in the main with Dr. McCauley's report. He says, there is no present indication of surgical intervention. Is there anything else that can be done for Mr. McAllister? A. I think very definitely so.

Q. Would you mind telling us about that? A. I think he ought to get intensive rehabilitation treatment. He ought to get on the machines and exercise his muscles that he has. I think he ought to have competent medical and nursing help to show him how he can better utilize the muscles that he has. He ought to have occupational therapy to work the various muscles of the foot and even of the hand too, so that he can really get optimum cure.

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Q. And how long do you estimate that will take? A. Oh, it will take two or three years at least.

Mr. Rassner: Thank you, Doctor.
No further questions.

Re-cross Examination by Mr. Gray:

Q. In other words, you think that the dead neurons in his anterior horns can be resuscitated? A. Not at all.

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Mr. Gray: That is all.

The Witness: We think—

Mr. Rassner: That is all. No further questions.
(Discussion off the record.)
(Witness excused.)

Mr. Rassner: I wonder if we could save a little time. I have Dr. Di Fiore here, but I would like to have his testimony, both direct and cross, admitted into evidence—

Mr. Gray: No. I wish to cross-examine him.
(Discussion off the record.)

Mr. Rassner: Dr. Di Fiore.

The Court: Will you proceed, gentlemen.

Mr. Rassner: I will call Dr. Di Fiore.

Dr. John A. Di Fiore—Direct.

DR. JOHN A. DI FIORE, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Doctor, will you let us have your qualifications, for the record? A. I was licensed to practice medicine and surgery in the State of New York in 1944. I am a graduate of Creighton University, having graduated on March 15, 1943. I served by internship at the St. Vincent's Hospital from April 1, 1943, to January 1, 1944. I served a residency in pediatrics at the St. Vincent's Hospital in New York City from January 1, 1944, to October 1, 1944. I then served in the Armed Forces from October 7, 1944, to October 18, 1946, during which time I was engaged in the treatment and care of neurological cases. Part of the time, I was chief of the neurological section of the England General Hospital in Atlantic City, New Jersey.

In 1946, I entered into private practice.

I am now certified by the American Board of Internal Medicine. I am assistant attending physician at the St. Vincent's Hospital, New York City, and I am attending neurologist at the New York Hotel Trades Council and Health Center in New York City.

Q. Doctor, were you in charge of the polio cases that were sent by the Army from overseas back to the United States, that is, during the war? A. Yes, sir, at the England General Hospital.

Q. You were in charge of that division that took care of polio cases? A. Yes, sir.

Q. Now, did you at my request, did you make several examinations of Mr. McAllister, that is one before the previous trial where you testified before and once before this one? A. Yes, I did.

Q. When was your last examination made of this plaintiff? A. The last examination was last Wednesday, that is January 7, 1953.

Q. Have you your report with you? A. No, I have no report.

Q. All right.

Now, can you tell us the nature of your examination and your findings? A. Yes, sir. The nature of the examination was a physical and neurological examination of McAllister, having at hand the previous history and physical and neurological examination that I had performed on him in January, 1948.

Q. What were the findings? A. My findings were that Mr. McAllister was severely paralyzed in both lower extremities; that he was not able to walk on his own, that he had to use crutches and braces on his lower extremities; that there was severe atrophy and paralysis of all the muscle groups of both lower extremities of the left buttock, of the left pectoralis muscle and of both triceps muscles and partially of both biceps muscles, and also atrophy of the right lower lumbar muscles.

Q. Doctor, is the delay in treatment of a week to ten days in the incipient stage of polio a competent producing cause of the aggravation and the causing of atrophy of muscles of the human body?

Mr. Gray: I object to this question on the ground that the witness hasn't been qualified. 387

The Court: Overruled.

Mr. Gray: I should like to have the right to cross-examine the witness as to his qualifications.

The Court: Go right ahead.

Cross Examination by Mr. Gray:

Q. Doctor, what is your present practice? A. I am certified by the American Board of Internal Medicine, I am a certified specialist.

Q. And what does that mean in lay language? A. In lay language it means that I am a diagnostician, as young as I look.

Dr. John A. Di Fiore—Cross.

Q. You are a diagnostician? A. Yes, I am a diagnostician of medical diseases.

Q. And what does that include? A. It includes all medical diseases that come to doctors. I enter into it as the so-called consultant and diagnostician.

Q. What type of diseases do you diagnose? A. All types of medical diseases, including neurological diseases.

Q. And what neurological diseases does that include? A. All types of polyn neuritis, poliomyelitis, spinal cord tumors, brain tumors, strokes which leave a person paralyzed—I can name an innumerable number of them, that is of neurological cases under my experience. I am the author of four medical papers on neurological topics.

Q. What are these topics, these four papers? A. By title they are first, Acute Nuclear Atrophy with Porphyria, which was published in the medical columns of North America in 1946 while I was in the Army. At that time I was asked to submit that paper for publication.

My second paper was entitled, "Pseudo-Diphtheritic Polyneuritis, which appeared in the Journal of Nervous and Mental Diseases in February, 1951. This was based on my experience with that type of case in the Army.

The next paper was on Polyneuritis Following Cutaneous Diphtheria, a very unusual type of condition. That was published in the Journal of Nervous and Mental Diseases in August of 1951.

The next paper was entitled, "The Guillain-Barre Syndrome," published in the Journal of Nervous and Mental Diseases in October of 1952. That was based on a series of cases also under my care in the Army.

It may be of coincident interest to this Court, perhaps, that they concern a group of cases that are very similar in many respects to polio.

Q. None of these four papers which you have described have poliomyelitis as a subject. A. Indirectly they did have poliomyelitis as a subject because these types of conditions have many features which have to be differentiated from

poliomyelitis, and therefore my knowledge has to be inclusive of poliomyelitis and other diseases as well as the disease on which I wrote.

Q. In other words, you were required in these various papers to distinguish the subject which you discussed from the subject of polio. A. Yes, sir, that is what we call differential diagnosis.

Q. Do you maintain an office for the practice of medicine now? A. Yes, sir, I do.

Q. What is your address? A. I have an address at 515 Park Avenue and one at 44 King Street, Manhattan.

Q. Do you generally practice general medicine? A. Yes, sir, internal medicine, which is general medicine limited to medical cases.

Q. Are you connected with any hospital now? A. Yes, sir, I am on the staff of St. Vincent's Hospital.

Q. In what capacity? A. I am assistant attending physician on the medical division; I am also a neurologist at the New York Hotel Trades Council and Health Center on West 50th Street in Manhattan.

Q. Is that a hospital? A. No, that is not a hospital, it is a very large health center which encompasses the employees of about 285 hotels in New York City, and I am a neurologist there. In other words, I am a neurological consultant.

Q. At the St. Vincent's Hospital, are you permitted to bring in private patients? A. Yes, sir.

Q. And do you also make rounds of the wards? A. Absolutely.

Q. Do you do any outpatient work there? A. Yes, sir.

Q. What type of outpatient work do you do? A. I am assistant attending physician in the diagnostic clinic, and I am assistant attending physician in the cardiac clinic.

Q. Do either of those clinics include the diagnosis of polio cases? A. Well, in the diagnostic clinic most any type of case may come before us.

Q. Have you within the last five years diagnosed a case of acute polio? A. Yes, sir.

Q. How many such cases have you diagnosed? A. I would say about five.

Q. And how long ago was the last case that you so diagnosed? A. Two summers ago.

Q. Have you treated a polio case or an acute polio case from inception to final disposition? A. I have treated acute polio cases from inception. To answer the second part, to final disposition, well, that would be quite difficult because the treatment of a polio case may go on for several years, and I have never had that particular opportunity, with perhaps one modification, and that was to almost its completion, and that happened to be in the case of Mr. Rassner's own son—if I may cite his case here—whom I treated from the fairly sub-acute stages and saw him through his complete, almost through his complete course of treatment, which was directly under my care and supervision at England General Hospital, and further under the care at the Halloran General Hospital from where he was discharged.

Q. He was an Army case? A. Yes, he was an Army case.

Q. He was brought back from the front? A. He was brought back from Germany.

396 Q. And was a paralytic case? A. Yes, he was a paralytic case from the neck down.

Q. Well, let us not go into a particular case—

Mr. Rassner: I was going to say may I be excused—

Mr. Gray: Well, I don't intend to continue on—

The Witness: I merely cited that case as an example in answer to your question.

By Mr. Gray:

Q. In your experience at England General Hospital, that was an evacuation hospital for convalescence polio cases from the European front— A. May I correct that? It

was not a convalescence hospital, it was a general hospital in the United States. A general hospital is not a convalescence hospital by any means; a general hospital is a hospital which actively treats acute cases of all types, and I was on the neurological division, so that my job was the care and treatment and diagnosis, of course, of neurological disorders of all types.

Q. What was your Army rank at that time? A. I was a captain.

Q. In the medical corps? A. In the medical corps.

Q. What had been your qualifications for appointment to that position? A. I was sent by the Army itself to a course in neurology and psychiatry and electroencephalography at the Mason General Hospital in Long Island.

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Q. How long did that course continue? A. All the training took was four and a half months.

Q. And did that course include the treatment of any acute polio cases? A. No, sir.

Q. Prior to your assignment to the England General Hospital at Atlantic City, had you treated any acute polio cases? A. I had not actually treated acute polio cases, but as a resident in pediatrics at the St. Vincent's Hospital it was our job to diagnose these cases medically, and in so far as we were not a contagious disease hospital, and it being a Board of Health ruling, our acute cases were transferred immediately for treatment to the Willard-Parker Hospital, the hospital for contagious diseases of New York City.

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Q. Therefore whatever experience you had had in St. Vincent's with the diagnosis of polio cases had only been to the extent of diagnosis and not to any treatment at all. A. No, sir.

Q. In St. Vincent's, in connection with your diagnosis of polio cases, were you assisted by a house physician? A. Yes, sir.

Q. And was your diagnosis alone accepted where polio cases were involved? A. The diagnosis made by a resident or house physician in cases of responsibility, and by that I

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mean where it entails the transfer of a case for definitive treatment to another hospital, must be confirmed by an attending physician on the staff.

Q. At that time you were resident pediatrician. A. That is right.

Q. And as a pediatrician, your duties related primarily to children's diseases, did it not? A. Yes, sir.

Q. And a polio only came in as an adjunct of a child's — that is among child diseases. A. Yes, sir, while I was on the children's division.

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Q. While you were on that division, how many cases of polio did you diagnose and send to the Willard-Parker Hospital? A. I would take a rough guess and say anywhere from 12 to 15 cases.

Q. And did you know — well, did you follow any of those cases? A. Very few of them because it is just very difficult to follow cases when one is tied up in his own work.

Q. But you gave none of those cases any treatment? A. No, sir, it was our important duty to immediately diagnose those cases and ship them right away to the Willard-Parker Hospital.

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Q. Now, going back to the England General Hospital, when cases were admitted there to the polio ward, they were admitted from the European front. A. No, sir; as a general hospital, cases may be sent to that hospital from most anywhere, and not all of our cases were from the European front. We had cases from the European theatre of war, from the Pacific theatre and in many cases they came from local and surrounding states within the United States. It was in that way that I was able to immediately see and direct the treatment of, I would say, at least three cases of poliomyelitis in the really acute stages, from the time of diagnosis, practically.

Q. Was it not true that practically all of the cases which were entered in the polio ward of the England General Hospital were sub-acute cases. A. I would say that is practically true.

Q. And by sub-acute cases what did you mean? A. By a sub-acute case I mean a case that is perhaps two to four or five weeks old from incipency, and a case that still has some symptoms of muscle pain and spasm and paralysis, and a case which still has to be actively treated by the method which we employ.

Q. Now, you say there were three cases which came up in your jurisdiction which were in an acute stage. A. Yes, sir.

Q. And by that, what do you mean? A. They were cases that had had—that had entered the hospital for some supposed obscure illness and in which we made the diagnosis of acute poliomyelitis, and in whom we instituted medical treatment which was the Kenny Hot Pack Treatment. In other words, these were cases that came directly under me from their very beginning.

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Q. Well, is it not true that you were in charge of the polio ward? A. I was in charge of the neurological section, which included polio cases. We did not have a ward designated as the polio ward.

Q. But these three cases were sent to your hospital as neurological cases or as polio cases. A. No, sir. I can't recall the specific details, but they were cases that were sent from the immediate vicinity, either as obscure diagnosis cases or perhaps maybe in one the diagnosis might have been already suspected. For example, the patient might have been sent from a nearby station hospital, let us say like Fort Monmouth, which was only a few miles away from us, and sent to us where we immediately arrived at a diagnosis, with the help of a spinal tap, and therefore immediately instituted treatment as soon as our diagnosis was made.

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Q. Is the spinal tap always indicative? A. Absolutely.

Q. Always? A. Yes, sir.

Q. Has that been your experience? A. May I ask exactly what you mean by indicative? Do you mean indicated or do you mean as the diagnostic.

Q. As the diagnostic. A. In my experience it is not always diagnostic, but it depends upon the stage at which the spinal tap is done. But, in the acute stages of polio in my experience it has always been diagnostic. In other words, where we have done a spinal tap on a patient, and in a very acute stage, and the patient did prove to confirm our diagnosis, as it were, that spinal tap was diagnostic.

Q. How many such spinal taps have you in mind? A. Well, going back again to the cases that I had as a resident at St. Vincent's Hospital, the cases that I transferred to the Willard-Parker, approximately 12 to 15.

Q. Were they all spinal tap cases? A. Oh, absolutely. We consider a spinal tap almost an emergency nature in polio because the diagnosis of polio is practically an emergency diagnosis. For instance, such as a heart attack, a heart attack would be an emergency diagnosis because the proper and early institution of treatment is most important.

Q. Are you speaking now of every polio case, or do you refer to Bulbar and respiratory cases? A. I speak of every polio case because we have no way of knowing which bulbar or spinal case will become paralytic.

Q. Well, if a case becomes paralytic, there is a difference, the point of paralysis is according to the portion of the body affected; is it not so? A. Yes, but I wish to modify actually your thought there in that a bulbar case and a respiratory case may be the same type of case in that they both may have paralysis of respiration; a bulbar case will involve the nerves of the so called bulb, or the tail end of the brain wherein they originate the specific nerves that control the respiratory function to the lungs and to the throat, and where also the respiratory center is supposedly located, that is where the impulse is for respiration originate.

Q. Well then, is it not true that the bulbar, the bulb involved in which bulbar poliomyelitis is involved, is at the base of the brain. A. Yes, sir.

Q. And the spinal polio is from the medulla oblongata

down through the spinal cord. A. Well, when we speak of the bulbar, of bulbar polio and when we speak of the bulb, we consider them, the medulla oblongata as part of the bulb. The bulb really includes the pons and the medulla. We include in the spinal, in that we mean those cases where the spinal cord itself is involved, and the spinal cord includes that part of the nervous system beginning from the first cervical vertebra, which is immediately below the medulla, down to the cauda equina.

Q. Then to reduce this to its lowest terms, your experience in the handling of acute polio cases has been limited to three instances. A. In the really acute cases, to three, but I have had other cases in sub-acute stages where we continued the treatment which is the same sort of treatment, the Kenny Hot Pack.

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Q. And the sub-acute stage is the convalescence stage, is it? A. No, sir.

Q. I beg your pardon. A. No, sir, the sub-acute stage is the stage that immediately follows the acute stage, but wherein the fever has come down and the severe pains and spasms have practically subsided, but it is still the stage in which the patient may still experience pain and spasm, and of course cannot move the muscle that is affected. In other words, we may subdivide an acute case of polio into the so-called acute stage, at least the clinical phases of it, into the acute stage, the sub-acute or sub-acute stage, and then the convalescence stage wherein the patient has his residuals but is still undergoing treatment.

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Q. In which of those stages, if any, has it been your experience that fever is found, that is a high bodily temperature. A. Well, the high fever is found in the acute stage.

Q. And not in the prodromal stage? A. Oh, yes, in the prodromal stage, too.

Q. Have you ever had a prodromal stage patient? A. Yes, sir, that is where our diagnosis comes in most importantly. In other words, we may make a very early diagnosis in a prodromal stage, and that may be a stage wherein the

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patient will have merely a high fever, not usually too high a fever, in fact, and may merely show signs of irritability and perhaps a slightly stiff neck, but in the presence of other cases going around at the time, at a certain time of the year, particularly, we are practically forced to do a spinal tap, and in those cases we will find a positive spinal tap and our diagnosis will be made, and then in a day or two or three the muscular signs or paralysis may show right out.

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Q. Aren't you confusing the prodromal stage with the preparalytic, that is the prodromal period with the preparalytic. A. I am not confusing it.

Q. Do you make a distinction between them? A. No, no, sir, they are essentially the same stage.

Q. And when a spinal tap is made, what is the report which indicates the presence of polio? A. In the very early stages there is an increase in the neutrophil neutrocytes, that is in the early stages, and then in a matter of a few days the lymphocytes become the predominating cell, and there may be an elevation of the spinal fluid protein.

Q. You say of fluid protein? A. Yes.

Q. I see.

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Mr. Gray: Your Honor, I press my objection to the qualifications of this witness to testify, to express an opinion, as to the causal connection between any state of facts and the contraction of polio by this libellant.

The Court: Overruled.

Mr. Gray: Exception, please.

Mr. Rassner: May I repeat the question?

Well, I will withdraw the previous question.

Direct Examination by Mr. Rassner (Continued):

Q. Doctor, assume Mr. McAllister had a stiff neck a week or ten days before the first of December, 1945, while

employed as a seaman aboard the Haines in the vicinity of Shanghai, China; that in addition to his stiff neck he had difficulty in movement of his arms and legs; that he felt hot all over, had a burning sensation throughout the body, had difficulty in chewing, had difficulty in biting, felt in general debilitated and weakness, had a very poor appetite or loss of appetite, and was unable to do his work and had to be confined to his quarters: Now, can you state with a reasonable degree of medical certainty whether a delay in diagnosing his condition and calling in competent medical aid and hospitalizing the man and giving him nursing care and treatment was a competent producing cause of aggravating the condition which resulted in polio, which resulted in atrophy of the muscles which you found on your examinations both previously and recently?

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Mr. Gray: That is objected to, he is not qualified.
The Court: Overruled.

A. Yes, I can state that with a reasonable degree of certainty that delay in diagnosis is in such a case—

Mr. Gray: You have answered the question yes.

Q. Will you please give us the basis of your opinion?

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A. Well, I believe I indicated it before in answering Mr. Gray that the diagnosis of polio first of all is practically an emergency, and it is in my mind an emergency because of the fact that the earliest time at which treatment could be instituted in these polio cases that eventually show muscle involvement, such as Mr. McAllister did, that in these cases a lot of damage and paralysis and stiff joints and future operations could be averted, could be prevented—

The Court: By what?

The Witness: By the early institution of treatment. That is why I stress the fact that the diagnosis of polio is an emergency diagnosis.

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Dr. John A. Di Fiore—Direct.

The Court: What is the treatment?

The Witness: The treatment, the accepted method of treatment today is the Kenny treatment or the modified Kenny treatment, as some people prefer to call it, which is a method of applying hot packs to the muscles that are involved in the paralysis. We say modify because in the bulbar cases we do use respirators for them, where I believe that originally Sister Kenny didn't feel they were necessary—that is why most people care to say modified Kenny treatment.

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The Court: In other words, put hot packs on the man.

The Witness: Absolutely. If you have a cold in your back, if I may use such an example, and if you have a muscle in spasm, which is what it is called, in the back, and if you don't treat it or expose it to the cool air, that cold in the back is going to get worse and you are going to get a crooked back, but if you put hot water bags or other forms of heat, that muscle spasm releases itself and you won't go around with a crooked back, and that condition will right itself in a short time.

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The Court: You don't mean that will heal polio, do you?

The Witness: It does not heal polio, but it will prevent the disformity that is produced as a result of the severe muscle spasms and the severity of the spasms not only of the muscles that are involved in and the nerve that is inflamed, but also in the muscles that are not directly involved but are in spasm because they are pulling against a bad muscle. In other words, the so-called coordination of muscles and the alienation of muscular motion that Sister Kenny spoke of, the words that she made famous, and which in common sense means take care of the good muscles too because they can go bad.

By Mr. Rassner:

Q. Is it universally recognized and was it universally recognized in November of 1945 that by the prompt application of the so-called Kenny method of treating polio that joint distortion and disformity would be absolutely eliminated in those cases? Is that the general consensus of opinion of all doctors, of all authorities?

Mr. Gray: I object to that because the witness is not qualified to answer.

The Court: I will allow him to answer.

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Go ahead, it is overruled.

A. I will have to modify your word "absolutely". I mean, in all fairness—

Q. Well, generally, is it generally accepted and is it the belief that— A. It is generally accepted, it is not only a belief, but experience—

The Court: Wasn't there some criticism of her method, Doctor?

The Witness: Sir, I believe that originally we could call it a criticism of her method because—well, let us be honest about it, she was not a medical doctor—

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The Court: That is right.

The Witness: —but nevertheless, we are using her method and we started using her method when it first went out and when we were criticising her, but we saw the good results of it.

The Court: Thank you.

By Mr. Rassner:

Q. Was it in general use throughout the American Public Health Services in 1945? A. Yes, sir, it was, as well as in the Army.

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Dr. John A. Di Fiore—Cross.

Mr. Gray: You mean the Army in the United States?

The Witness: I mean the Army throughout the world. Our methods of treatment in the United States Army are standardized, and they come out in medical bulletins that are distributed to us from Washington, D. C. There are very few things that we can do on our own in the Army without authorization. In other words, if I used the Kenny method of treatment on my patients, I have the authorization to use it right from the top because it was the accepted method of treatment.

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Mr. Rassner: No further questions.

The Court: Is that all?

Mr. Gray: We are now getting down to the meat of the question, and that is without waiving my objection to the lack of qualifications of the witness. I should like to ask him some questions.

The Court: Yes, go ahead.

Cross Examination by Mr. Gray:

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Q. This method of hot packs to relieve the muscle spasm in spasm or contracted muscle has been in use for at least as long as you are alive? A. Absolutely.

Q. So the Kenny method was really an application of an old principle, to give some comfort and relaxation to a muscle that was contracted? A. Yes, sir.

Q. You don't mean to say that relieving a muscle of tenderness affects the effect of the polio virus on the anterior horns of the spinal column which gives the motor impulses to that particular muscle, do you? A. Yes, sir, I do, and I would have to explain that because your question is perhaps highly technical and not—

Q. Not too intelligible? A. And not too scientific. Now, if I may explain that, that is a difficult thing for most anybody to understand, and that is how a hot pack placed

on a muscle which is supplied by a nerve which comes from a motor anterior horn, that is where the polio virus has attacked, how that muscle could be helped by a hot pack.

Q. I didn't ask you that, I asked you what effect that had upon the action of the virus in the neurons in the anterior horns. A. It has no effect on the virus because at that stage the virus has already done its damage.

Q. How do you explain your testimony that the application of the Kenny method to a muscle in spasm would affect the final paralysis or weakness of that particular muscle?

A. That is what I tried to attempt to explain when I said that your question was highly technical, and I had best explain such a state of affairs, and my explanation is that if one has a muscle which is involved in inflammation, no matter from what the cause may be, and the condition is such that that muscle is made useless, that muscle will die unless it is moved. In other words, its nerve supply need not be completely destroyed, it may be only partly involved, and the whole muscle will be completely involved purely because only one fraction of its nerve supply is involved. To put it in a simple term, the whole muscle rebels—

Q. Well, Doctor, may I—

Mr. Rassner: I object to counsel interrupting until the witness has completed his answer.

May I have a ruling of the Court that Mr. Gray not be permitted to interrupt until the witness has finished?

Mr. Gray: He had finished.

The Witness: I did not finish.

A. To put it in simple terms, that whole muscle rebels and goes into spasm. Because a muscle is in spasm, it does not mean that its whole nerve supply has been damaged by the polio virus.

Do you follow that reasoning?

Q. I am with you so far. A. And therefore when that

muscle spasm has quieted down, the rest of the muscle or the whole of the muscle may be allowed to function, and the sum total result may be that just a small part of that nerve supply was involved to begin with, and that muscle may recover completely. We have seen that many times. I have had the opportunity to observe that in people that I have not treated directly, but in people that I have been able to follow up after a paralytic involvement, that is where they have recovered completely.

Q. That is from a paralytic involvement they have recovered completely? A. Yes, sir, because they had early treatment.

Q. What kind of treatment? A. Kenny treatment, the treatment given at Willard Parker Institute.

Q. And you don't give the Kenny treatment until you have spasm, do you? A. As soon as there is any evidence of involvement of a muscle, which may be pain, it may be spasm—

Q. Spasm results in pain, does it not? A. That is right.

Q. And the purpose of your— A. It may be merely tenderness before the muscle goes into a spasm.

Q. Well, tenderness. A. It may be weakness of the muscle before the muscle is in spasm.

Q. When you speak of tenderness, you mean hyperesthesia? A. No, sir; hyperesthesia is not necessarily present in polio because it is sensory involvement, and in polio we don't get a sensory involvement.

Q. Isn't pain of your spasm involved in the sensory nerve? A. But when we say hyperesthesia, we mean over-sensitive to light touch.

Q. Well, what is the sensitivity of the polio patient's muscle if it isn't hyperesthesia? A. Well, that is a different type of sensibility which we refer to as deep sensibility and sensibility which is carried by a different set of nerves which travel up the posterior column of the spinal cord, and that has nothing to do with the anterior horn motor cells.

Q. Those are sensory nerves, aren't they? A. They are sensory nerves, yes.

Q. And the use of the Kenny pack, which amounts to a wet, warm compress, if used on a cold in a back muscle, produces the same result as it would produce on a polio patient who has a spasm, does it not? A. Yes, it relaxes the spasm and allows proper function.

Q. And the relaxation of a spasm or the tenderness of a muscle is what you seek to obtain in order to keep the muscle in a state where it may be rehabilitated? A. Yes.

Q. Now, where does this spasm occur, according to your experience? A. The spasm occurs, as I said before, in both the involved muscle and in the antagonistic muscle. The antagonistic muscle is that muscle which is created by nature to naturally pull against its opposite fellow. Let me explain it by an example: The biceps muscle has a function of flexing the elbow. We speak of the triceps muscle as its antagonist. In other words, that muscle is always pulling against the other in order to create a balance, otherwise we always would be in a constant state of flexion and extension. Nature has endowed us with muscles that have an antagonistic function. Now, in polio, if, let us say, the biceps muscle is involved itself, through its nerve supply, it will go into spasm. Now, the natural effect on the triceps muscle will be to go into spasm to pull against the biceps, to keep it in place, so that in the treatment of polio we are not only treating the good, we are not only treating the involved muscle, that is muscles that are directly involved through the nerve supply, but we are treating good muscles which are going bad, as it were, because of the effect of the polio virus on the bad muscle itself.

Q. Well, will you please explain a little more clearly what you mean when you say that a good muscle will go bad when its motor nerve supply is normal or adequate just because the opposite muscle may have had the neurons in the anterior horn affected, that is, some of them deteriorated and some actually killed? A. Yes, I am glad you

asked that, because that is another phase that is hard for most people to understand, too, and that is that if a muscle is kept in constant spasm by some stimulus of any kind, be it a stimulus such as polio, originated by the bad muscle to pull against it, that if that muscle is kept in a constant state of spasm that muscle when it is in spasm, well, it is actually contracted and is shortened, and to that extent the spasm of it, the spasm of the so-called good muscle will eventually result in a shortening of that muscle and contractures and lead to deformities.

Frequently, if it is around a joint, it will cause a stiff joint and an operation will have to be performed on those muscles, too, and their tendons.

Q. Well, you didn't find any stiff joint in Mr. McAllister, did you? A. Oh, no, sir, I am just giving that as an explanation.

Q. And you didn't find any deformity in Mr. McAllister, did you? A. Yes, his deformities are in the form of his severe atrophy of his legs and of his triceps muscle and the deformity of both his triceps and his right calf in the form of replacement of muscle tissue by fatty tissue; I consider that a deformity.

Q. You consider that a deformity, but you don't mean to say that his bones have been pulled out of alignment, do you? A. Oh, no, sir.

Q. Then your definition of deformity, applied to practical realities, relates to the atrophy and the shrinking of muscle tissue rather than to a disarrangement of any of his bones or muscles? A. Yes, sir. I am using the words as their common sense definition: He has this deformity, and so therefore he has deformity.

Q. That is a very broad sense, isn't it? A. It is broad, yes, but it is correct.

Q. Now let us get back to the inception of the spasm phase of the disease. Does the spasm occur in the prodromal stage or pre-paralytic phase? A. The spasms may occur in the prodromal stage. For example, as I mentioned

earlier, in the prodromal phase, one of the symptoms may be a stiff neck that is due to a spasm of the neck muscle.

Q. And you apply a Kenny pack to that? A. If the diagnosis is made at that time, Kenny packs are instituted immediately.

Q. Suppose a diagnosis had not been made at that time, what do you do with a stiff neck? A. We wait until the diagnosis is made. If you can't make a diagnosis at that time, you might as well give up.

Q. And you mean not do anything more after that? A. No, what I mean to say is that if a patient shows these symptoms, that is the stiff neck and those other things, and if one does not make the diagnosis, especially with the aid of a spinal tap, then a person just has no diagnostic acumen.

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Q. In other words, then, there you don't propose to treat a malady until you diagnose it and treat it intelligently? A. You can't treat it until you have diagnosed it, you can't treat it properly until you have made the proper diagnosis.

Q. In other words, it would then not have been proper to apply the Kenny method treatment to Mr. McAllister until he had some spasm, would it? A. Yes, but we have to go back to his story that he did have some trouble, as I recall, chewing, and his face muscles and hand, and we know from the natural history of the disease that the man must have had spasm at that stage.

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Q. Let us assume that he had difficulty in chewing; under those circumstances, where would you apply the Kenny pack? A. Right to the face.

Q. On each side of the face? A. Absolutely.

Q. You have found that he can chew normally now, did you not? A. Yes, sir.

Q. So whether or not he received the Kenny pack had no effect on his present condition, did it? A. It had no effect.

Q. Now— A. If I may add to that—

Q. You have answered the question.

Now, what happens to a neuron when it is attacked by a polio virus? A. Well, the first thing that is attacked is the nucleus or the heart of the cell, and that undergoes swelling, and that nucleus bursts, and when that dies the rest of the cell dies, and that shrivels up. We call that pyknosis.

Q. Does anything happen then? A. Well, that is the death of the cell, then that cell dies, its nerve function is gone.

Q. What happens to the virus that killed it? A. Presumably the virus—

Q. Well, do you know, we don't want any more guesses than we can help. A. We don't know, I am saying we "presume"—

Q. What becomes of the dead cell? A. The dead cell is replaced by scar tissue, it is not replaced by another nerve cell.

Q. Is the dead cell removed in any way? A. Yes. In the nervous system we have a scavenger which is called the gitter cells, which are scavengers, and they eat up the fragments of these cells and remove them.

Q. Now, is it not true that when polio attacks an anterior horn, some of the cells are not killed but are only perhaps lamed? A. Yes, sir.

Q. What happens to those cells in the gradual progress of the disease? A. We have no way of telling that because we don't know just which cells were attacked and recovered and which cells were directly killed off. There is no way of telling that.

Q. And there is also no way of telling what cells are not affected by the virus? A. That is right.

Q. And is it possible to prognosticate at the beginning, at the onset of the disease, how many or what proportion of the cells in an anterior horn are going to be eventually affected? A. It is not directly possible because of the fact that we have so many other muscles that are involved in

the secondary spasm that it is hard for us to say whether or not they are directly involved or indirectly involved.

Q. In other words, it is impossible to say during any part of the course of the disease what the final result is going to be, isn't it? A. In any particular case—

Q. That is as to the degree of the final destruction of the cells in the anterior horn. A. I would have to answer your question by saying that in a particular case we cannot prognosticate, but in our general run of experience we know that if we take 100 cases of polio with muscle spasm and don't treat them, and then we take another hundred of cases with muscle spasm and give them the Kenny treatment, we definitely know that those cases receiving the Kenny treatment will have fewer sequelæ or residuals or contractures and stiff joints than the untreated cases, and thereby we prove that the early, adequate treatment is definitely beneficial and definitely prevents a lot of these deformities.

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Q. That is more an argument, than a proof, isn't it? A. No, sir, I consider that a proof, that is how we base our scientific knowledge, not on one case, but on many cases.

Q. Now, if the patient complains of dizziness while at sea, would that be a ground for suspicion to you as a diagnostician that he had polio? A. You mean the single symptom of dizziness?

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Q. Dizziness at sea. A. And no other symptom?

Q. No other symptom. A. That is not enough to make a diagnosis of polio.

Q. It could be a question of seasickness? A. Absolutely.

Q. Now, if he had a headache, would those two symptoms of themselves indicate to you that he had polio? A. If I knew there were other cases about, then I would be suspicious, but as to two isolated symptoms out at sea with no knowledge of other cases about, or no knowledge of previous contact within a reasonable incubation period, I would say they are not sufficiently suspicious of a diagnosis of polio.

Testimony.

Mr. Gray: That is all.

Mr. Rassner: I have no further questions, Doctor, thank you.

The Court: Now, you don't need the doctor any more?

Mr. Rassner: No, sir.

Mr. Gray: No, sir.

The Court: Very well.

(At this point the court was adjourned until 11:00 o'clock, January 14, 1953.)

Brooklyn, New York,
January 14, 1953.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED

The Court: Now, how do we stand here?

Mr. Rassner: Mr. McAllister, will you please take the stand?

We are through on direct with the libellant, your Honor, and we are offering him now for cross-examination.

The Court: All right.

Mr. Rassner: Are you prepared to cross-examine, Mr. Gray?

Mr. Gray: Oh, yes, sir.

The Court: How long did this case take when it was tried before Judge Coxe?

Mr. Rassner: About two weeks.

The Court: You don't expect to take that long this time, do you?

Mr. Gray: Oh, I think we can clean up everything perhaps by tomorrow, except for two of my doctors. One I can't get here until next Wednesday afternoon.

Robert A. McAllister—Recalled, cross.

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The Court: All right.

Mr. Rassner: Perhaps I will stipulate to what they will testify to if called. I don't see any issue —

Mr. Gray: I prefer to call them.

The Court: That is all right. We can arrange that in the next week or so.

Mr. Rassner: Suppose we see what they want to testify to, and perhaps we can stipulate —

The Court: Well, he might want me to see the doctors.

Mr. Gray: Certainly.

The Court: You can't tell —

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Mr. Rassner: All right.

The other case started on February 2nd and finished on February 9th.

Mr. Gray: 1948.

The Court: That is quite a record there.

Mr. Rassner: Yes, sir. We had to convince twelve people, and not one. As a matter of fact it was thirteen — the jury and Judge Cox.

The Court: Very well.

Mr. Rassner: But we used a great deal of cumulative evidence there, and I intend to dispense with all of that here. The testimony will just be corroborated by two witnesses instead of the great number that we used; and not Sister Kenny. She is dead now.

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The Court: All right.

ROBERT A. McALLISTER, the plaintiff, recalled as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Cross Examination by Mr. Gray:

Q. Mr. McAllister, during your testimony yesterday I thought that you told his Honor that you had to go up on

deck twice to turn on the water in the trough. A. That is true, Mr. Gray.

Q. Is that true? A. That is right, sir.

Q. Didn't you have a relief valve on your line? A. Well, there was a relief valve. As I know the pressure, it was building up on the gauge and I assumed that the water was shut off on deck, which I went up to check.

Q. By the way, have you collected any pay for overtime work during that voyage, that you did not perform?

455 A. I don't recall, Mr. Gray. I even got money afterwards, a 10 per cent bonus for something or other.

Q. But I am asking you, did you put in a claim for overtime work that you did not perform on the voyage?

A. Did I put in a claim for overtime work?

Q. Yes. A. That I did not perform?

Q. That is right. A. I don't know if I did or not.

Q. Well, is it your practice to ask for pay for work that you didn't do?

Mr. Rassner: Just a minute. I object to that as argumentative.

Mr. Gray: This is cross-examination.

The Court: Well, I will allow it.

Go ahead.

A. Is it my practice?

Q. Yes. A. I never wanted anything that wasn't rightfully coming to me.

Q. Then can you truthfully say that you did not collect any moneys for overtime work that you did not perform on that voyage?

Mr. Rassner: I object to counsel trying to get an answer from the witness one way or another as to something that the witness stated he doesn't remember.

Mr. Gray: Let's see if I can refresh his recollection on that.

Robert A. McAllister—Recalled, cross.

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Mr. Rassner: Not by repeating the question, your Honor.

I object to the question as having been asked and answered. The witness says he doesn't remember.

The Court: I will allow it. Go ahead.

Mr. Gray: Will you repeat the question, please? (Question read by the reporter.)

The Court: If you don't remember you can say so.

The Witness: That is what I say, your Honor. I don't remember.

The Court: Well, then that is the end of that.

The Witness: I could not.

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Q. You don't remember whether you collected for overtime—

Mr. Rassner: I object to counsel repeating a question three and four times.

Mr. Gray: I want to have this very well—

The Court: I will allow it. Go ahead.

Q. You don't remember whether during this voyage you collected overtime for work performed on the voyage that you didn't perform? A. I don't recall, Mr. Gray, whether I received—

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Q. Whether you did or not? A. That is right, sir.

Q. But do you recall any occasion when you obtained pay for work that you did not perform when you were working on the Haines? A. I just signed the pay vouchers that were handed to me at the time when I was in the hospital in North China, and I just signed—what it was, I did not check one way or the other what was coming to me. I did not even know how much the company owed me, or anything about that. I just signed what was handed to me, that day—

Q. That was in North China? A. That is right, yes, sir.

Q. Did you sign any in New York? A. After the voyage?

Q. Yes. A. I went down to the office there one time, I know, and I did sign different papers for—something about the cargo, I think. It was a 10 per cent bonus. And some other papers, and they gave me the money. I never requested them to.

Q. That is, you signed some papers and got some money in New York? A. That is right, sir.

Q. Now, let's go back to this pumping arrangement on the deck. Are you sure that you went up on deck twice because your pressure on your gauge raised on your circulating pump?

Mr. Rassner: I object to that type of cross-examination, repeating the question over and over and over and over, your Honor. When the witness has answered that question he shouldn't be asked the same question over a number of times. It is just building up a record and delaying the trial.

The Court: Now, remember, there is no jury here, and I think that there is a more liberal attitude called for by the Court for that reason. Don't worry. Let's get along.

Mr. Rassner: I object to a question being repeated more than three times, your Honor.

The Court: All right, let's go ahead.

Mr. Gray: I wish to make sure that we understand each other, Mr. McAllister.

I understand your answer to be that because the pressure gauge on your pump rose you went up on deck to see what was the matter.

Is that true?

The Witness: That is right, sir.

Q. What pump were you using? A. The fire pump.

Q. The fire pump? A. Yes.

Q. That was a circulating pump, wasn't it? A. No, sir. The circulating pump was the pump more or less for overboard discharge.

The fire pump was used for the purposes of flushing out the trough that was on deck.

Q. Well, did you have circulating pumps on board? A. Yes, sir. There was one down in the engine room.

Q. Your fire pump is a heavy pump, isn't it? A. That is right, sir.

Q. It is a heavy duty pump? A. That is right, sir.

Q. It is also called a wrecking pump, isn't it?

Mr. Rassner: I object to that. What difference does it make?

Mr. Gray: Will you please stop interrupting?

Mr. Rassner: No, I won't. Let's understand this. I will not stop interrupting you when you are asking inconsequential questions on unimportant and immaterial matters. You are just delaying this trial, and dragging the trial on for no purpose at all. He was asked a question and he has answered your question. What else it is called is unimportant.

The Court: I think we will make better progress if we go ahead.

Mr. Gray: This is directed to the credibility of the witness.

The Court: Yes.

Mr. Rassner: Oh, that is a lot of nonsense.

The Court: All right, go ahead.

Q. What pump were you using? A. The fire pump.

Q. That is also known as a wrecking pump, isn't it?

A. That I never heard—a wrecking pump?

Q. Yes. A. I never heard it referred to in that manner, Mr. Gray.

Q. How long have you been to sea—going to sea as an engineer? A. September, 1944; I believe that is it.

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Robert A. McAllister—Recalled, cross.

Q. Have you sailed on more than one Liberty ship?

A. Yes, I have. I have sailed on more than one Liberty ship.

Q. In the engine room? A. In the engine room.

Q. And the general engine room layout on Liberty ships is practically identical, isn't it? A. That is right, sir. Practically identical.

Q. Do you have circulating pumps on Liberties?

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Mr. Rassner: Oh, I object to that, your Honor, as inconsequential, and entirely immaterial. I don't see what that has to do with the issues.

The Court: I will allow it.

Go ahead.

Have you got such things on Liberties?

The Witness: Well, I always considered the overboard discharge pump as a circulating pump.

Q. Well, your overboard discharge pump does what? What is it used for? A. It discharges the sea water. It usually goes through the condenser to cool off the steam, to kind of condensate it back into water again, and then it is discharged overboard again, when the use is extracted from it.

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Q. That is known as a condenser pump also? A. Well, a condensate pump also.

Q. Yes. Well, wait a minute. Your condensate pump is another pump, isn't it? That is called a feed pump, and it pumps your condensate back into your boilers? A. That is called a feed pump.

Mr. Rassner: I object to Mr. Gray attempting to try to show how much he knows about the mechanism of a ship. This is not the place for it. It has nothing to do with the issue.

The Court: I will allow it. Go ahead.

Q. Don't you have circulating pumps on Liberties in addition to your feed pump?

Mr. Rassner: That is objected to. It is immaterial. It is wasting time.

The Court: Come on; we are taking up more time with objections than we are with the questions. Go ahead.

A. By a circulating pump you mean in a sense of a condensate pump, but I always attributed it as a circulating pump.

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Q. Don't they have pumps on board Liberties, that are called circulating pumps? A. I always considered the overboard discharge pump a circulating pump, and the pump that you are referring to as taking the condensate from the hot water and putting it back into the boiler I always referred to as the feed pump.

Q. Yes, certainly, and the pump that you were using to supply water on deck was what pump? A. The fire pump.

Q. Now, what kind of arrangements were made, that is, how was the fire pump hooked up to provide water on deck?

A. Well, in case of fire, your Honor, and as precautionary measures, they have outlets on different parts of the vessel.

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In case an emergency arose through a fire, they could just start up this pump, and by attaching the hose to these outlets, do the best they could to control the fire.

And it so happened that they built the trough on board the vessel where there was an outlet for the hose, and the arrangement that was made was to keep that trough clean of the excretions of the passengers, of these Chinese people, was to put a hose there running through the trough, and have the fire pump going continually, pumping seawater up through the line and up through the fire pump to flush this stuff out so that it wouldn't just lie there, and just have an awful odor from it.

Robert A. McAllister—Recalled, cross.

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Q. So that the water was pumped by the fire pump, that is, through your fire circulating system, and there was a take-off from your fire circulating system—the hose that ran through this trough; is that true? A. That is right, Mr. Gray.

Q. Now, did that circulating system also provide salt water for toilets and for flushing down decks? A. For flushing down decks, yes, but not for toilets. Toilets had a sanitary pump for their own particular toilet facilities.

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Q. Now, this fire pump that you were using had a relief valve, didn't it? A. It is required by the regulations to carry a relief valve.

Q. Yes, and at what pressure was the relief valve set? A. It had a maximum allowable working pressure on the pump, and anything above that, it would probably leave off the excess.

Q. Well, what was the pressure at which your relief valve was set? A. That, Mr. Gray—

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Q. Well, 150 pounds? 200 pounds? A. Well, in this particular instance, Mr. Gray, we weren't looking for maximum pressure. It was just enough to keep a slight flow of water going through this trough, to keep it clean. That is, we were not looking to have the pump going at full speed to send a terrific stream of water through that trough, because if anybody was sitting on it, it would be extremely wet. They just kept it at a pressure maybe just enough to keep it flushing out the trough.

Q. Don't you know what the usual pressure was that you had set on your relief valve on your fire pump? A. Not offhand now, Mr. Gray, I could not—

Q. Now let's get down to this. You did have it set at some pressure, didn't you? A. Yes, sir, they must have had it set at some pressure.

Q. So that if the pressure in the line reached the pressure of your relief valve it discharged, and your line did not— A. Did not play.

Q. —did not press up. A. That is right, sir.

Q. Now, then, wasn't your relief valve working on this occasion? A. Well, the pressure hadn't reached to that extent where it would, where the relief valve had worked. Or maybe it did. Maybe that is what called my attention to it.

Q. You mean your relief valve wasn't working? A. I didn't say that. I said maybe it did work. It was something that must have caused my attention to the fact that the valve was shut off. The raise in that—I believe what it really was—we only had it set—the pump was just barely going up and down to have enough of a flow of water going through that trough to keep it clean. We were not looking to wash the trough overboard, or anything like that, sir. We just wanted enough there to keep it clean, and maybe say just 15 or 25 pounds pressure was on the pump, and anything above that, even without the relief valve going off, would indicate that the valve was shut off.

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It wasn't a question of always worrying about whether the pump was working or not. It was a question of keeping that flow of water going through that trough so that the excretion wouldn't just lie there without being washed overboard into the sea.

Q. It is my recollection of your testimony that you said that the pump stopped because of a high pressure. Did you say that? A. I don't believe that I said it stopped, Mr. Gray.

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Q. No; the pump wouldn't stop because of high pressure, would it? A. No, sir.

Q. Because the relief valve— A. Would relieve it.

Q. So that when it got up to the pressure of the relief valve the water would be discharged back into the sea from the discharge line. Isn't that right? A. That is about right.

Q. Yes. Now, whom did you have in your engine room while you were in port, when the vessel was discharging cargo? Did you have an oiler? A. I believe there was someone else down there in the engine room.

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Robert A. McAllister—Recalled, cross.

Q. There is always an oiler on watch with the licensed officer in the engine room, isn't there? A. I don't know if this was on watch, or whether it was on deck work. In port, you see, we are on day work, the engineers, and the firemen and water tenders stand on regular watch in sequence, because you need somebody all the time to attend to the boilers.

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Q. You also had an oiler to take care of oiling the machinery, and watching your dynamo, and watching your various pumps. A. Not in port. The firemen and water tender did that. He relieved the oiler of those duties in port, while the oiler was also sometimes on day work.

Q. Of course this only occurred in the daytime. A. That is right.

Q. Because you were only discharging during the daytime? A. That is the only time. I know it was the daytime, because I remember the daylight.

Q. And during that time the deck engineer was on watch. A. That is right.

Q. Wasn't that the duty of the deck engineer, to see that the water was flowing properly? A. To tell you the truth, I did not look up any regulations. I just saw it, and I thought I would go up and do something about it.

480 Q. Why didn't you send one of your unlicensed men in the engine room to go up and check up on it instead of your going up, and leaving the engine room without a licensed man on watch? A. There probably was a licensed man. As I say, we were working day work.

Q. There probably was a licensed man on watch besides yourself? A. It wasn't a watch.

Q. Well, what do you call it when you are on duty? A. In port you are on day work. It is not what they call a sea watch, or an anchorage watch, or anything like that. They put you on day work. You work a regular eight-hour day like any businessman. Then at night one of you—at night you have the night engineer for the period during the night, to cover the fact that there must be a licensed officer aboard the vessel at all times.

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Q. And there must be a licensed officer in the engine room aboard the vessel at all times. Isn't that correct? A. I don't know the stipulation on that, if there has to be a licensed man in the engine room at all times. I don't know about that.

Q. Whenever you were on watch you were in the engine room, weren't you? A. When I was on watch at sea? Or do you mean when I was on day work in port?

Q. When you were on day work in port, you were in the engine room, weren't you? A. Not all the time. I would come up to go to the toilet, or have my lunch, or things like that.

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Q. When you went up to have your lunch, didn't the stand-by engineer come down to relieve you? A. Not in port, Mr. Gray. We may all go up to have lunch together.

Q. And knock off all work in the engine room? A. That is right, sir.

The Court: Where was this trough that you are talking about? Where was it?

The Witness: That was on the deck, on the main deck of the ship. It was built to accommodate the passengers that came aboard the vessel.

The Court: And was it used as a latrine, so to speak? 483

The Witness: That is right, sir. That was what it was used for. It was used as a latrine.

The Court: That is what it was used for?

The Witness: That is right.

The Court: They could urinate in it, or do the other thing?

The Witness: That is right, yes, your Honor.

The Court: And then it was flushed out by this water, was it?

The Witness: That is right, your Honor.

The Court: Is that it?

The Witness: That is right, sir.

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The Court: And this was the trough that you went up to see, to find out if the water was circulating? Is that right?

The Witness: Well, I felt that it was off on account of the pressure of the pump—it was going up.

The Court: I see.

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The Witness: I felt that it was off when I went up. It came to my knowledge in the wind-up that they took the valve off, completely off, so that no one could shut it off, and so if no one could shut it off, they turned it off, and cracked the valve, and the water would keep on flushing this trough. Then they took the wheel off so that nobody could turn it off again by hand, in order to insure continuous—

The Court: And that affected the flushing. Is that what you mean?

The Witness: Well, when they turned it off, it did affect the flushing.

The Court: I see.

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The Witness: It was my understanding that the First Assistant told the deck engineer to remove the wheel of the valve so that no one could turn it off, and it would have to be continually flushing that trough at all times.

The Court: And that was what was occurring when you were in Shanghai, or wherever it was? When you were in port?

The Witness: When we were in port, that is right, your Honor.

The Court: Is that it?

The Witness: That is right, your Honor, when we were in Shanghai.

By Mr. Gray:

Q. How long was this trough that you are speaking about?

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The Witness: Say from here to the end of the table (indicating).

Q. About ten feet? A. Approximately, more or less.

Q. And one end of the trough rested over the side of the ship? A. Mr. Gray, I stated—I never went in to use those toilet facilities at all. What the general make-up was, what they did there, I did not know.

Q. Well, you saw the trough, didn't you? A. I saw the trough as a general look. I didn't specify, or take any specifications of it, or anything like that.

Q. Well, where did the water go that flushed the trough? A. Over the side.

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Q. Over the side of the ship? A. Yes.

Q. So that the end of the trough was over the side of the ship, wasn't it? A. Or an outlet that would go over the side of the ship.

Q. Who was the oiler on watch with you? A. His name?

Q. Yes. A. Bill McLeod.

Q. That is M-c L-e-o-d? A. That is right, sir.

Q. When did you last see Mr. McLeod? A. He is right here now.

Q. He is here now? A. Yes, sir.

Q. Now, then, you were warned by the master very specifically against associating with the Chinese, weren't you? A. That is right. Very specifically.

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Q. And did you associate with them? A. Ashore?

Q. Ashore or on board. A. Well, not in any familiar sense that they were friendly, like that, but I was—passed them—or close to them.

Q. How many times did you go ashore at Shanghai between the 26th of September and the first of November? A. Quite a few times, Mr. Gray.

Q. You went ashore with this master sergeant you are speaking about? A. That is right. I went ashore with him and with other people, because his duties didn't always leave him free either.

Q. And you went ashore also with Lieutenant Scott, didn't you? A. No; Lieutenant Cook.

Q. Lieutenant Cook? A. That is right, sir.

Q. He was a passenger on your ship? A. That is right. He was Security Officer. I believe that was the title they called him. He was an Army Officer, put on board there by the Army.

Q. Now, on the first of November the vessel left for Hong Kong, did she not? A. That is right, sir.

491 Q. What did she do when she got to Hong Kong? A. What did she do when she got to Hong Kong?

Q. Yes. A. She arrived in Hong Kong, and what she—I think the first thing was, to the best of my recollection, I thought they were going to discharge the passengers at Hong Kong. In fact everybody—

Q. You mean she went down to Hong Kong and came back again and did not discharge passengers or cargo? A. Mr. Gray, I don't know what they did exactly on deck during that time that they went down to Hong Kong.

Q. Had you ever been in Hong Kong before? A. You mean ashore there?

Q. Yes. A. No, not ashore in Hong Kong.

492 Q. And you did not go ashore on this occasion either? A. No, sir.

Q. And then when you got back to—you got back to Shanghai, then, on the 11th. Is that true? A. That is right, sir.

Q. On your voyage out you stopped at Port Said, did you not? A. That is right, sir.

Mr. Gray: May it be stipulated, Mr. Rassner, that the vessel arrived at Port Said on August 19, 1945, and departed on August 21, 1945;

Arrived at Columbo, Ceylon, on September 3, 1945, and departed from Columbo on September 4, 1945, and arrived at Port Swettenham on September 12, 1945, and departed on the same day;

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Arrived at Singapore on September 13, 1945, and departed from Singapore on September 14, 1945;

Arrived in Hong Kong on September 19, 1945, and departed from Hong Kong on September 23, 1945;

Arrived in Shanghai on September 26, 1945, and departed from Shanghai for Hong Kong on November 1, 1945;

Arrived in Hong Kong on November 5, 1945, and departed from Hong Kong for Shanghai on November 7, 1945;

Arrived in Shanghai on November 11, 1945, and departed from the dock at Shanghai on November 22, 1945;

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Departed from Shanghai Harbor for Tsing Tao on November 23, 1945;

Arrived in Tsing Tao on November 25, 1945, at 10:30 a. m., and anchored 45 miles from the wharf;

Went alongside the wharf at Tsing Tao on November 28, 1945, and the vessel departed from Tsing Tao on December 3, 1945.

Mr. Rassner: Yes.

By Mr. Gray:

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Q. Did you go ashore at Port Said? A. No, sir.

Q. During the voyage? A. No, sir, I didn't.

Q. Had you ever been there before? A. No, sir.

Q. Did you go ashore at Columbo in Ceylon? A. Yes, sir, I did.

Q. And did you go ashore at Singapore? A. No, sir.

Q. Did you go ashore at Port Swettenham? A. No, sir.

Q. And you didn't go ashore at Hong Kong on either trip? A. No, sir.

Q. But you did go ashore at Shanghai a number of times between September 26th and November 1st? A. Yes, sir.

Q. Where did you go when you went ashore at Shanghai? A. Well, I went to—this Army sergeant, he brought me up to the hotel there, and I was introduced to a few of his—to his friends, and I went to a seamen's club that they had in Shanghai.

I also was in the Navy Officers' Club through the courtesy of the Navy, and I went in, one time I went into a place that was supposed to be very nice, the Atomic—it was mostly filled with service men and various people like that. I went there and—

Q. Did you do any shopping in Shanghai, in the native stores? A. That was done aboard the ship, sir, Mr. Gray. You could practically buy anything right on board the vessel.

Q. Then you didn't do any shopping ashore; is that correct? A. The majority of my shopping that I bought was aboard the vessel.

Q. I asked you if you did any shopping ashore. A. To the best of my recollection, no. I didn't do any shopping ashore.

Q. Now, you say there was only one drinking fountain on board the ship? A. One on the main deck, outside of the officers' salon.

Q. Wasn't there a drinking fountain in the engine room? A. There was one down in the engine room, yes.

Q. You were not obliged to use the drinking fountain on the deck, were you? A. Not if I wanted to go down to the engine room every time I wanted a drink.

Q. Could you get a drink by going to the mess room? A. Well, the water wasn't refrigerated, or anything like that. It was not cold.

Q. I asked you if you could get a drink by going to the mess room. A. No.

Q. You could not? A. Not in the mess room.

Q. They had no water in the mess room? A. Not out of a spigot, anything like that.

Q. You could get water out of a drinking glass, could

you not? A. Well, if they brought it in from somewhere, they could pour it there.

Q. Now, you had been on board this boat for nearly a year? A. No. Four months, Mr. Gray.

Q. Don't you know that you get water in the mess room during meals from your galley? A. During the meals. That is why I said you get the water served to you there. There was nothing that I knew where you could actually get the water to you—it was served to you.

Q. So that if you didn't want to expose yourself to contamination you didn't have to use this drinking fountain on the deck, did you? A. No; if I wanted to go downstairs every time I wanted a drink.

500

Q. You didn't say anything about the drinking fountain in the engine room in the answers to the interrogatories, did you? A. I mentioned it even yesterday, that I drank water down in the engine room with salt tablets. I took water with salt tablets.

Q. Oh, you said you took water with salt tablets down in the engine room? A. That is right, yes, sir.

Q. That isn't my recollection.

Mr. Rassner: I object to counsel making any comments.

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The Court: All right.

Q. Now, I call your attention to this interrogatory, No. 19—

“19. State the number and exact location on the vessel of all drinking fountains claimed in Article 22nd to be common, and state

- (a) the type, and
- (b) method of operation of each such fountain;
- (c) which, if any, of such fountains the libellant used;

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(d) whether the libellant could have obtained drinking water on board the vessel by any other means than by the use of such fountains and, if so,

(e) describe all such means in detail."

This is your answer, sworn to by you:

"19. One drinking fountain was used in common.

(a) It was an open fountain.

(b) Manual operation.

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(c) The only one available.

(d) Water could have been obtained by going to other parts of the vessel.

(e) Water could have been obtained in the mess-rooms."

Is that correct?

A. Well, that is. That is correct. That was a common drinking fountain, the one that was on the deck.

Q. And wasn't the drinking fountain in the engine room a common drinking fountain? A. No one else came
504 down there. It was more or less for the engineroom crew. That wasn't what I consider open for everyone.

Q. These fountains were the gusher type, were they not? A. That is right, sir. You turned them on, and they had a spout that shot up.

Q. You turned them, and they spouted up? A. That is right.

Q. And that is the usual type that is on a vessel, isn't it? A. As far as I know.

Q. The usual type that you see? A. Well, as far as I know that is the usual type.

Q. Where was your cabin located? A. It was on—what deck is that now? The next deck above the main deck.

Q. In the midships house? A. Midships, that is right.

Q. And did you have a key to your door? A. I don't know if I did or not, Mr. Gray. I never locked it, I mean.

Q. You never locked it anyway? A. No, I never did.

Q. Now, then, what were the first symptoms that you claim you felt, resulting in your final poliomyelitis attack?

A. Dizziness, Mr. Gray. I first when I moved, I would get—

Q. You felt dizzy? A. Like little spots would be before my eyes, but if I stopped a minute, why, it would come right back to normal.

Q. I see. When did you first feel dizzy? A. That was when we were coming from Hong Kong to Shanghai the second time.

Q. That is on the trip when you arrived at Shanghai on November 11, 1945? A. That is right, sir.

Q. Now, I show you a report of illness and I ask you if that is your signature on the front page. A. It looks like my signature.

Q. Isn't that your signature? A. It is not my regular signature, no, sir.

Q. Didn't you sign it? A. I imagine I did. I signed it. I could sign now, and show you the difference—I mean—may I read it?

Q. Certainly. A. I imagine I signed that—

Q. You admit that you signed it? A. No one else would sign that.

Mr. Gray: I offer it in evidence.

Mr. Rassner: No objection.

Mr. Gray: This is an illness report.

(The illness report referred to was marked Respondent's Exhibit D in evidence.)

The Court: What is the date of that?

Mr. Gray: It is not dated, your Honor, but there is a date in it which is important.

The Witness: They never asked me any explanation there either.

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Mr. Rassner: Mr. McAllister, wait until you get a question.

The Witness: I am sorry.

Q. This is a report which you made to the Pharmacist's Mate on board, is it not? A. Yes, I made a report.

Q. And his name is Mr. Napier? A. Yes, sir, that is right; correct.

Q. And on this, in Item No. 6, it states: "Illness contracted: (a) Date 11/24/45; (c) Place—at Sea (aboard)".

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Did you not tell Mr. Napier the circumstances of your illness when you made the illness report? A. Actually, Mr. Gray, that was known before that time—

Q. No, I am not asking you that. I am just asking you whether you told Mr. Napier the truth when you made your illness report to him. A. I told him that I was a sick—

Q. You told him— A. I told him that I was a sick man.

Q. On the 24th? A. If that was the date. That was the date—maybe that is the date he used. He probably made an official record of it.

Q. Did you tell him any other date? A. Before that I had complained that I was ill, yes.

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Q. To him? A. I don't know if it was to him personally.

Q. You know that it wasn't to him personally, don't you? A. No, I wouldn't say that either.

Q. You made no other illness report out, did you? A. No; not before that, no.

Q. Now, in your complaint against Cosmopolitan Shipping Company, Incorporated, in the United States District Court for the Southern District of New York, the summons in which was issued on July 16, 1946, I call your attention to this language in Article Ninth—first I will read Article Eighth.

(Reading) "That the plaintiff"—

Mr. Rassner: Now, I object to that—I object to

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reading anything unless the paper itself is in evidence. If Mr. Gray wants to offer that complaint in evidence I have no objection, but unless it is offered in evidence I object to his using it for the purpose of reading from it, your Honor.

Mr. Gray: I am cross-examining the witness about statements made in prior pleadings.

The Court: All you want to know by reading it is if that refreshes his memory?

Mr. Gray: Yes, sir.

The Court: I will allow that.

Mr. Rassner: Yes. I have no objection to that.

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The Court: Show it to him. I don't want it up here now, Mr. Gray.

Q. I show you a copy of this complaint and ask you to look at Article Ninth and see if the statement in there does not refresh your recollection as to the date of your contracting the disease, on the 24th of November.

Mr. Rassner: Is Mr. Gray making a distinction between the date he contracted the disease and the time he first felt the symptoms?

The Court: Well, that will come later.

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Mr. Rassner: I think the question is confusing.

The Court: All right.

Mr. Rassner: And I object to the question on the ground that it is confusing.

The Court: Well, this is when he made, you might say, the official complaint.

Mr. Rassner: Yes.

The Court: Now, go ahead.

(Document handed to witness.)

The Witness (After examining document): Thank you.

The Court: That is about right, isn't it?

The Witness: That is when I was seriously ill, your Honor.

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Q. Now, the statement in this complaint is that "• • • more particularly"—

Mr. Rassner: I object to any statement contained in any other paper—

The Court: Yes. We don't need the complaint. You can ask him about the dates if you want to.

Q. When you saw your attorney before this suit was brought did you tell him the truth as to the facts of your claim? A. When I first saw the attorney?

Q. Yes. A. Let me see—I was in the Marine Hospital when I first saw him, in Staten Island.

Q. You saw Mr. Dembo? A. Mr. Dembo.

Q. In the Marine Hospital in Staten Island? A. That is right.

Q. And you told him the facts of your case, did you not? A. That is right.

Q. As you remembered them then? A. That is right, sir.

Q. And that was before the 16th of July, in 1946, wasn't it? A. Yes, sir, I guess so.

Q. And you had been taken ill the previous November, hadn't you? A. That is right, sir.

Q. And the facts were then more fresh in your mind than they are today, weren't they? A. That is right, sir.

Mr. Gray: Now then, may it be stipulated that in this complaint it is stated as follows:—

Mr. Rassner: No; I object to that. I consent to the complaint going in evidence in toto or not at all.

The Court: That complaint was drawn by an attorney and signed by the attorney, and it is verified by this man?

Mr. Rassner: I don't think—

Mr. Gray: I don't think it was verified, your Honor.

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Mr. Rassner: No, it was not verified.

The Court: It was not verified?

Mr. Gray: No, it wasn't verified, your Honor.

Well, instead of putting in the whole complaint, may I not read into the record the part that is particularly pertinent here?

Mr. Rassner: No; I object to that.

The Court: I thought that both sides didn't want any part of the first suit to come into this trial.

Mr. Rassner: No; that isn't so, your Honor. I wanted the entire record to go in, but I said that if there was an objection I would consent not to have it go in, but I wanted it in. It was Mr. Gray who did not want it to go in.

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The Court: But you withdrew your offer.

Mr. Rassner: That is right, but it wasn't because both sides didn't want it.

The Court: All this is just a waste of time.

Mr. Gray: This is for the purpose of showing that in 1946 this libelant—

Mr. Rassner: I object to counsel reading from any complaint, and telling the Court—

The Court: He isn't reading. Let him state his purpose.

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Go ahead.

Mr. Gray: My purpose is to show, or, this is to contradict the witness's testimony as affecting his credibility.

The Court: As to a date? As to a certain date?

Mr. Gray: As to a certain date.

The Court: Well, he will tell you about that. Give him the date and ask him if he was sick then. If he was sick before. Go ahead. It is plain enough.

Mr. Gray: Well, I offer in evidence the Eighth and Ninth Articles of the complaint in the action in the Southern District of New York.

Mr. Rassner: I consent. No objection.

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The Court: You consent?

Mr. Rassner: I will consent to it, your Honor. I am not going to waste any more time on it. I will consent to it.

The Court: All right.

Mr. Gray: Paragraph eighth—(reading) "That the plaintiff suffered injuries and illness to his person in the course of his employment aboard the vessel aforementioned.

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"NINTH.—That the aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees; the fault, neglect and omission of officers and fellow seamen aboard the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition and reasonable state of repairs; in defendant's failure to take any means or precautions for the safety of the plaintiff; in failing to provide the plaintiff with a reasonably safe place wherein to work, and in otherwise being careless, reckless and negligent in the premises, more particularly in that on or about the 24th day of November, 1945, the plaintiff was caused to become seriously sick, ill and disabled, in that Chinese citizens were taken aboard the vessel without any physical examinations and without any means or precautions taken to safeguard the plaintiff from contamination or infection and that no sanitary means or precautions were taken for the health and safety of the plaintiff, or any means or precautions taken to prevent contagion aboard the vessel, all of which resulted in the plaintiff becoming sick, ill and disabled, and the defendant was further at fault in failing to provide prompt, adequate and proper medical aid and attendance, nursing care and hospitalization, but caused, allowed and permitted the plaintiff's

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illness to become active and progressive without taking any means or precautions to check or cure the same, and the defendant was otherwise careless, reckless and negligent in the premises."

By Mr. Gray:

Q. Now, in that same suit there were interrogatories addressed to you, were there not, which you answered under oath. A. I imagine there were, Mr. Gray.

Q. Now I call your attention to interrogatory No. 6, which reads as follows:

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(Reading) "State as nearly as possible the date or dates when such alleged injuries were sustained and such alleged illness was contracted as alleged in paragraph 8th of the complaint."

And your sworn answer was:

"Plaintiff took sick several days after the Chinese troops and civilians came aboard the vessel, which date of illness to the best of plaintiff's recollection was November 24, 1945."

I also call your attention to the 7th interrogatory, which reads as follows:

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"7th. (a) Describe the first observed symptom or symptoms of the illness alleged in paragraph eighth of the complaint, and (b) state the date or dates upon which they were so observed."

And your sworn answer was:

"(a) Weakness and dizziness.

(b) November 24, 1945."

Now, does that refresh your recollection as to when you first felt dizziness? A. That is when—that was the time when it was officially reported, when the purser made it official on the report, but that wasn't the time when I first

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felt ill, which I never thought was going to be anything serious. That is the way I felt about it.

Q. And you haven't told anybody else that you first felt dizziness on the 24th? A. I haven't told anybody else what?

Q. You told no one else that you first felt dizziness on the 24th of November? A. I told—what I felt was that in the beginning, coming down from Hong Kong, to Shanghai, that is when I first felt these spots, and not the extreme dizziness, but these spots, when I got up or stopped, or do any sudden movement, these spots would come up before my eyes. You know, Mr. Gray, I could not possibly foresee how ill I was going to be.

Q. No; of course not. Did you tell anyone else that you first felt dizziness on the 24th of November, besides Mr. Napier?

Mr. Rassner: Well, now, I object to that. There is no such testimony. Mr. Gray is misquoting the evidence.

The Court: Do I understand that prior to the 24th you felt physically down in certain ways?

The Witness: That is right, your Honor. I didn't feel—

The Court: You were fooling around for several days before that, not feeling right?

The Witness: That is right, your Honor.

The Court: Is that it?

The Witness: Not feeling up to par, but I did not know just how—

The Court: But on the 24th you just gave up?

The Witness: Then I knew I felt very ill.

The Court: That is when you made your report?

The Witness: That was when it was officially made, your Honor.

The Court: All right.

Q. That was the first time you told Mr. Napier about it, wasn't it? A. Directly? Gee, I could not be sure, Mr. Gray,

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if that was the first time directly, although I had known Pat had passed at different times, and I know I had complained that I had been ill to the First Assistant and Chief Mate.

Q. Well, you made these answers to these interrogatories as I read them, did you not?

Mr. Rassner: That is objected to as already answered. I object to his going over the same thing twice.

Mr. Gray: What was the answer?

Mr. Rassner: The answer was yes.

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Mr. Gray: Yes?

The Court: The answer was yes.

When was it that they gave you the bicarbonate of soda?

The Witness: I think that was after I went to bed, your Honor. That is right.

The Court: That was after the 24th?

The Witness: That is right, your Honor; when I went to bed I felt pretty ill, and that was when I got the bicarbonate of soda.

Mr. Gray: I offer in evidence a certified copy of the clinical record of this libellant at the United States Merchant Marine, while the patient was on the U. S. S. Repose, from December 7, 1945, to December 18, 1945.

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Mr. Rassner: I object to that.

The Court: On what ground?

Mr. Rassner: I have no opportunity to cross-examine the man who made the record. I haven't even seen it. Let Mr. Gray prove his case the way he is supposed to do it.

I object on the ground that no foundation has been laid for these records, and I have no opportunity to cross-examine the man who made it.

The Court: You haven't seen the record?

Mr. Rassner: That is right.

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The Court: You don't know anything about it?

Mr. Rassner: Yes, sir.

Mr. Gray: The witness has already testified that he was hospitalized on the U. S. S. Repose.

The Court: We are talking about a record—

Mr. Gray: He said that there has been no foundation laid.

The Court: Well, he said he hasn't seen the record and he hasn't had a chance to cross-examine the doctors who made it, or anything like that.

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Mr. Gray: I am offering this as a public record.

Mr. Rassner: May I see it?

Mr. Gray: Certainly.

Mr. Rassner: Maybe I can stipulate—

The Court: Well, look at it.

Mr. Rassner (After examining the document):
Objection withdrawn.

The Court: All right, the objection is withdrawn.
It is received.

(The U. S. Merchant Marine clinical record referred to was received in evidence as Respondent's Exhibit E.)

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Mr. Gray: Would your Honor like to look at it?

The Court: No, I don't care to look at it at this time.

Q. You were also hospitalized at the Naval Hospital at Guam, were you not? A. That is right, sir, Mr. Gray.

Mr. Gray: I offer in evidence a certified copy, under the seal of the Department of the Navy, of— a complete photostatic copy of the original clinical record of the United States Naval Hospital at Guam, for this libelant, for the period from December 19, 1945, to December 31, 1945.

Mr. Rassner: No objection.

(The above-described document was received in evidence as Respondent's Exhibit F.)

Q. Now, Mr. McAllister, while you were in the hospital of the Marine Corps at Tsingtao— A. Yes, sir.

Q. —were any sandbags put on your legs? A. No, sir.

Q. Were any sandbags put on your legs on the U. S. S. *Repose*? A. Yes, sir.

Q. That was the first time it was done? A. Yes, sir.

Q. While you were at the hospital in Tsingtao did you have any spasms in your legs? A. Yes, sir.

Q. You had pains in your legs in Tsingtao? A. I had twitching.

Q. Your legs were twitching? A. That is right, sir.

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Q. You had no pain which would— A. Oh, yes, sir.

Q. —which would pull your legs up? A. Yes, sir. I had pain. Yes, sir.

Q. And they did not put any sandbags on them in Tsingtao? A. No, sir.

Q. Did you have a spinal tap at Tsingtao? A. Yes, sir. On the First.

Q. Right after you got ashore? A. That is right. December 1st.

Q. And you went ashore at Tsingtao on the First of December, 1945? Is that correct? A. That is right, sir.

Q. And you were assisted ashore by two hospital corps men? A. That is right, sir.

537

Q. And you were taken to the hospital in an ambulance? A. That is right, a converted—it was an ambulance.

Q. A converted jeep? A. It served the purpose of an ambulance.

Q. And you walked to the ambulance? A. I was assisted, sir.

Q. Yes, but you could bear your weight on your legs, could you not, or did they carry you? A. No, they did not carry me. They just went along beside me, one on each side of me.

Q. And at that time did you have pains in your legs? A. A burning sensation. I had a burning sensation in my legs.

Robert A. McAllister—Recalled, cross.

538

Q. Just a burning sensation you had in your legs at that time? A. That is right.

Q. Did you walk from the ambulance into the hospital? A. That is right, sir, with the corps men.

Q. And were you put in a private room or in a ward? A. In a ward.

Q. About how many other patients were in the ward with you? A. Just—I would say forty.

Q. Did you stay in that ward until you were evacuated to the U. S. S. Repose? A. That is right, sir.

539

Q. When you were evacuated to the U. S. S. Repose were you carried out on a stretcher? A. Yes, sir.

Q. And they flew you down by airplane? A. That is right, sir.

Q. When you got on board the U. S. S. Repose, were you also put in a ward? A. No, sir.

Q. You were put in a private room? A. Yes, sir.

Q. And you remained there until about the 17th or 18th of December? A. That is right, sir.

Q. Did they tell you on the U. S. S. Repose that you had polio? A. Yes, sir, they did.

540

Q. Now, from the time that you reported unable to do your duties, you remained in your bunk? A. That is right, sir.

Q. Until you went ashore? A. That is right, sir.

Q. Now, aren't you mistaken as to the time when you went to your bunk permanently? Wasn't it the 26th of November? A. No, sir.

Q. You are sure it wasn't the 26th? A. Yes, sir.

Q. Well, you performed your regular duties, didn't you, on the 24th and on the 25th and on the morning of the 26th? A. No, sir.

Q. I show you a book which purports to be an engineer's rough log, and ask you if that is the rough log book of the Edward B. Haines from the 17th of October, 1945, to—at least to the—it is up to the 26th of November, 1945, beyond which I am not asking you whether it is the log or not—

Robert A. McAllister—Recalled, cross.

541

Mr. Rassner: May I ask if it is the same log that was used in the previous trial?

Mr. Gray: It is.

Mr. Rassner: I have no objection to its going into evidence.

Mr. Gray: As the log of the ship?

Mr. Rassner: That is right. You can put it right into evidence.

Mr. Gray: I offer it in evidence.

(The log referred to was received in evidence and marked Respondent's Exhibit G.)

542

The Court: Now, in case of an appeal, don't you think it would be wise to have the record show that that doesn't have to be printed as a part of the record, but that it could be referred to by the Appellate Court?

Mr. Gray: In the last appeal we stipulated that we would substitute photostatic copies of the various pages.

The Court: That is right.

Mr. Gray: We never have trouble on an appeal. (Discussion off the record.)

Q. Now, Mr. McAllister— A. Yes, sir.

543

Q. —I hand you this book, which is marked Respondent's Exhibit G, and ask you to state on the record the watches for which your signature appears, starting with November 10, 1945, and continuing as far as your signatures appear in that book.

Mr. Rassner: If the Court please, the record is in evidence. It speaks for itself. It can be read right into the record.

The Court: He can read it right into the record. It will save a lot of time. I think we have been all over it.

Mr. Rassner: Certainly.

544

Robert A. McAllister—Recalled, cross.

Mr. Gray: Not quite, your Honor.

The Court: Well—

Mr. Gray: The difficulty is—

The Court: He said that somebody would sign sometimes for another man.

Mr. Gray: Yes, but I want to go into that very carefully.

The Court: All right.

Mr. Gray: May I step up to the witness stand?

The Court: Certainly.

545

Mr. Gray: If I show it to the witness I believe he can examine it more readily.

The Court: Yes, we will save a lot of time that way.

Q. Now, Mr. McAllister, does your name, your signature, not appear for the first watch, that is, the 12 to 4 p.m. watch, on November 10th, and also on the 12 to 4 watch, from midnight to 4 a.m., on the 11th of November? A. That is right, sir.

Q. Also on the 12 to 4 p.m. watch on November 11th? A. That is right, sir.

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Q. And also on the 12 to 4 a.m. watch on November 12th? A. That is right, sir.

Q. Also on the 12 to 4 p.m. watch on November 12th? A. That is right, sir.

Q. And you didn't stand any watch, any further watch, on that day? A. I did not sign any. Let's see. No, I did not sign anything in there.

Q. You did not sign it? A. That is right.

Q. And your signature doesn't appear again until the 4 to 8 p.m. watch on the afternoon of November 14th; is that correct? A. That is right, sir.

Q. And you also appeared on the 8 to 12 noon watch on the 15th of November? A. Yes, sir, that is right.

Q. That is your signature? A. That is right, yes, sir.

Robert A. McAllister—Recalled, cross.

Q. Now, then, your signature next appears on the 12 to 4 p.m. watch on November 17th? A. That is right, sir. All day.

Q. That is, you stood all day, that is, from 12 noon until 4 a.m. the following day? A. That is right, sir.

Q. That is on November 17th to 18th? A. That is right, sir.

Q. Then on November 19th you stood the watch from 4 to 8 p.m.? On November 19th? A. Yes, sir.

Q. And you also stood the watch from 8 to 12 noon on the 20th—November 20th—no—from 4 a.m. to 8 a.m. on November 20th? A. I signed for it.

Q. And then your name doesn't appear until November 22nd, on which date you signed the watch from 12 noon to 4 p.m.—on November 22nd—is that correct? A. I signed for that, yes, sir.

Q. And you also stood the anchor watch from 12 midnight to 4 a.m. on the 23rd? A. I signed for it, yes, sir.

Q. You did sign for it? A. Yes, sir, that is right.

Q. On the 23rd, the watch from 12 noon to 4 p.m. also bears your signature, does it not? A. That is right, sir.

Q. And your signature also appears on the watch on November 24th, from 12 midnight to 4 a.m.? A. That is right, sir.

Q. And also on the 25th—your signature appears for the watch from 12 noon to 4 p.m. on November 24th? A. Yes, sir.

Q. And it also appears on the watch from midnight to 4 a.m. on November 25th? A. That is right, sir.

Q. And it also appears as the night engineer on November 26th from midnight to 8 a.m.—midnight to 8 a.m. on November 26th? A. It appears there, yes, sir.

Q. Now, then, on the watches of the 26th there are no indications of readings of pressures or gauges or anything at all in your handwriting, are there? A. No. Nothing.

Q. But on the two watches of November 24th and November 25th, these oil pump and the other notations here

550

Robert A. McAllister—Recalled, cross.

in these two watches are in your handwriting, are they not?

A. Yes, sir. It looks like my handwriting.

Mr. Rassner: I can't hear you.

Mr. Gray: He said, "yes, sir, that looks like my handwriting."

The Witness: Yes, sir.

Q. And that also applies, does it not, to the entries for the watches which you signed on November 23rd and November 24th? A. Yes, sir.

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Q. And also for the watch on November 22nd from Noon to 4 p.m.? A. That is right.

Q. Now, Mr. McAllister, is it your claim that although your signature appears on those watches, you did not stand them? A. That is right, sir.

Q. What was your purpose in signing a watch that you did not stand? A. Well, I felt that later on I would make it up. I would make it up to the engineers, whoever stood my watch. I would make it up to them for—in other words, they were covering up a little bit for me, and I would pay them back at a later date.

552

Q. Didn't you know, Mr. McAllister, that you were entitled to your pay when you were sick on board a vessel?

A. Mr. Gray, I did not know—sometimes like everything else, you don't think of everything at one time. You just do what you think at the moment.

Q. And didn't you also know that any engineer who stood your watch was entitled to overtime when he worked more than eight hours in twenty-four hours under the union rules? A. Well, if we always held technicalities with each other I suppose there wouldn't be a lot of work done aboard a ship.

Q. No, I did not ask you that. Didn't you know that under union rules an engineer who does more than eight hours' work a day aboard ship is entitled to overtime? You knew that, didn't you? A. Oh, yes; yes, sir. If he does

more than eight hours' work a day aboard ship he is entitled to overtime.

Q. And the overtime that he would be entitled to recover would be from the ship owner and not from you, wouldn't it? A. That is right; that is right.

Q. Is that the only reason that you give, that you can give, for the appearance of your signature and your handwriting in the log entries for the 22nd, 23rd, 24th, 25th, and 26th of November? A. That is right, sir.

Q. That is the only explanation you can give? A. That is the only explanation I can give.

Q. Now, who was the engineer that stood your watch on the 22nd? A. The only thing I knew about what was going on then, Mr. Gray, was, the First Assistant brought me up the log book to sign.

Q. The First Assistant brought you up the log book to sign? A. That is right, sir.

Q. Did he ask you to sign the log book? A. Well, he gave me the whole business, whatever he thought, and he had me fill it in, and I signed it.

Q. Wait a minute. You say he gave you the whole business that he thought. What do you mean by that? A. Well, whatever he had done on the watch, and the temperatures and pressures and so forth.

Q. Do you mean to say that the First Assistant stood your watch for which you signed on the 22nd? A. I don't know, Mr. Gray, who stood the watch. I really don't. All I know is that he brought the book up to me.

Q. And did he ask you to sign your name and fill it in? A. I signed my name and filled it in.

Q. No; I asked you, did he ask you to sign it and fill it in. A. Did he ask me?

Q. Yes. A. I don't know if at that time he directly asked me—I think he just brought it up and said, "Here it is, Bob," and I filled it in and signed it.

Q. Where did you get the information to fill in your temperatures and pressures and so forth? A. From the First Assistant.

Robert A. McAllister—Recalled, cross.

Q. How did he give it to you? From his head? A. No; he had a piece of paper there that he had written on, just almost similar to the way it was in the log book, the way the temperatures and pressures and so forth, and whatever was done on the vessel.

Q. Did he have it all ruled off like the rulings of a log book? A. No, oh, no. It wasn't ruled off anything like that.

Q. Well, how could you tell which particular item should have been entered in a particular square in your log book?

A. Well, because they were put in the corresponding space more or less, where—after continual taking a log for a period of time you would know more or less where each one should belong.

Q. Had you ever done that before? A. What? Taken temperatures and pressures?

Q. No, no; had you ever done that before? Did you ever have anyone bring you the log, the blank log, with certain data for you to fill in and sign your name to it? A. Before this trip?

Q. Yes. A. I had occasion to do—not brought it to me, but I had occasion to stand watches for other people—did work for them—and signed the log as if they had done it themselves.

Q. On this ship? A. I think at the beginning there—I am not sure—I stood watch for one of the engineers. I stood the watch for—

Q. When did you stand this watch? A. Oh, I don't know. That was at the beginning, at Shanghai.

Q. At the beginning, at Shanghai? A. It was a night watch.

Q. You stood a night watch at Shanghai? Was it the First Assistant? A. I can't be positive, Mr. Gray. I don't know whether it was the other way around—whether the First Assistant stood it for me, or whether I stood one for him. It was either one way or the other, but whichever one stood it, the other signed for it as if he stood it.

Q. You don't know whether you signed when the First Assistant stood a watch for you, or whether he signed—
A. When I stood for him.

Q. Or whether he signed his name when you stood for him? A. That is right, sir.

Q. Are you sure that that occurred? A. I am not positive.

Q. Now, didn't you stand the midnight to 8 a. m. watch on November 26th, as night engineer? A. No, sir.

Q. You did not? A. No, sir.

Q. I show you an overtime sheet totaling \$297.50, and ask you if that is your signature at the bottom. A. That is right, sir.

560

Q. And will you please refer to the last entry on that sheet and tell us what that means?

Mr. Rassner: I object to that. It is not in evidence yet.

Is that the same paper that was used on the previous trial?

Mr. Gray: No; this has not been used before.

Mr. Rassner: I object to it unless it is offered in evidence.

The Court: What is this paper?

Mr. Gray: I offer it. It is an overtime sheet.

561

Mr. Rassner: No objection.

The Court: Received.

(The overtime sheet referred to was marked Respondent's Exhibit H.)

Q. Referring to that sheet, which is Respondent's Exhibit H, does it not appear on the last line that you received overtime pay for eight hours' work as night engineer on board on the 26th of November, 1945? A. It does show that, yes, sir.

Q. And you were paid that money in New York, were you not? A. I don't know if I was paid there, or if I was paid when I got off at China. I don't know.

562

Robert A. McAllister—Recalled, cross.

Q. You don't remember where, but you were paid, were you not? A. Oh, I imagine I had whatever was coming to me.

Q. Now I call your attention to an answer, a sworn answer of yours, to interrogatory No. 13 (c) in the civil action in the Southern District of New York, and ask you if this refreshes your recollection as to when you went to your bunk permanently on this voyage. The question is:

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"13. State (a) whether plaintiff reported his alleged injury and/or illness to any one of the officers of the vessel, and, if so, (b) state the names of the persons to whom such report is claimed to have been made and, (c) the date upon which each such alleged report was first made."

And your answer is as follows: "13. (a) Yes." That is the answer to the question whether plaintiff reported his alleged injury or illness to any one of the officers of the vessel.

564

Your answer to (b) is "First Assistant Engineer and Purser." That was in answer to the question, "State the names of the persons to whom such report is claimed to have been made." And your answer to (c), "The date upon which each such alleged report was first made," is this:

"Immediately upon becoming ill and several times thereafter up until plaintiff was relieved from his duties. Plaintiff does not recall the dates of reporting his illness, but it was before November 24, 1945, on which day his face became paralyzed and he again reported to the 1st assistant engineer and purser. The plaintiff was not relieved from duty until the following day when the 1st assistant engineer took over his watch and plaintiff went to his cabin and remained there until removed from the vessel on or about December 1, 1945. That while plaintiff was in his cabin, he still was not provided

Robert A. McAllister—Recalled, cross.

565

with any prompt, adequate or proper nursing care, cure or treatment, but was left without any attention, medical supervision or treatment, and was not transported to a hospital until December 1, 1945."

Then you did stand your watch up until November 24th according to that.

Mr. Rassner: That is objected to as argumentative.

The Court: I will allow him to answer that.

A. No, sir.

Q. That is, this answer is incorrect?

566

Mr. Rassner: I object to that. He did not say that it is incorrect, and I object to—

Mr. Gray: I am asking him if it is incorrect.

Mr. Rassner: I don't think you asked him. I think you made a statement.

The Court: He has already explained that somebody would cover up for him when he didn't feel able, and that he would cover up for somebody else.

Q. Why did you think you had to cover up? What was there to cover up? A. Not in the sense you call cover up. It was a matter of cooperation and taking over. We were not hiding anything. There was nothing to hide about it. It was common practice on seagoing ships to interchange watches at a port for purposes like that.

567

The Court: As long as there was somebody standing there—

The Witness: As long as there was somebody down there, your Honor.

The Court: All right.

The Witness: That was the important thing. Who was down there did not make much difference.

The Court: All right.

568

Robert A. McAllister—Recalled, cross.

Q. And if anybody stood your watch he was entitled to overtime, was he not? If he had stood his own watch?

Mr. Rassner: That is objected to as repetitious.

The Court: He said that they arranged that later among themselves.

Mr. Gray: But, your Honor—

The Court: All right, go ahead.

Were they entitled to overtime?

569

The Witness: I never discussed with him whether he wanted overtime. I mean, if it came to a point where somebody talked to you like that, why, you wouldn't possibly have any cooperation with him at all. I mean, you would keep it strictly on the—as the book—as they say the book shows. You wouldn't do it.

The Court: All right.

Q. When you were ill you were entitled to have relief by another engineer, were you not? A. I should have been, yes, that is right.

570

Q. Well, when you are sick and stay in your bunk because of illness as a matter of common practice you are relieved by another engineer, are you not? A. Well, I should think so, yes, sir.

Q. Or hadn't it happened with you? A. I don't know who went down or what arrangements were—

Q. I am not talking about this particular time. I am talking now about the general practice aboard ship. When an engineer officer is sick he is relieved by another engineer officer, is he not? A. That is right.

Q. Who stands the sick engineer's watch, and his own watch too? A. Not all the time. He stands his own. Sometimes they split that on a six-six basis between the engineers.

Q. But if the engineer stands more than eight hours' watch in twenty-four hours, he is entitled to overtime pay for the excess, is he not? A. Well, he should be.

Q. Well, isn't that true under the union rules? A. Under the book, that is true.

Q. Yes. Do you know of any reason why the officer who did in fact stand the watch which you say he stood, for which you signed, could not sign the book, the log book? A. Why?

Q. Is there any reason why he could not have signed the log book to show the truth of who stood the watch? A. I don't see any reason why, that I know of.

Q. Now, back in January of 1948 you were examined by Dr. Di Fiore, were you not? A physical examination. A. That is right, that is right. 572

Q. And did you not tell Dr. Di Fiore at the time of that examination that you were sick and feverish and had a headache about the 24th of November? A. Maybe, if that is what is says there, I probably did say that to him.

Q. An that was the 24th of November, 1945, was it not? A. 1945 would be the time in question.

Q. You did not report to Mr. Napier that you had any venereal disease, did you? A. Venereal disease?

Q. Yes. A. Not that I ever recall, Mr. Gray.

Mr. Gray: That is all, your Honor.

Mr. Rassner: No further questions. 573

The Court: One minute. I have a recollection of some kind—you were speaking a little low once in a while—wasn't there a notice published, or put on the ship, about polio being present—

The Witness: Yes, sir, your Honor.

The Court: —ashore?

The Witness: Yes, your Honor.

The Court: Where was that?

The Witness: That was more or less true, where we congregate in general. I don't just recall now. I know we were told about it. I was told about it verbally.

574

Robert A. McAllister—Recalled, cross.

The Court: Was it pasted on the board somewhere?

The Witness: Yes, sir, your Honor. I think it was posted on the board.

The Court: That is, you were cautioned about going ashore and eating there, and so forth?

The Witness: Being too familiar. In other words, to take precaution when you went ashore to use good common sense, to keep yourself free and clear from eating—

575

The Court: Now, that is when you were approaching what port?

The Witness: The Chinese waters, your Honor.

The Court: That is, including Hong Kong, Shanghai, and all of the—

The Witness: That is right, your Honor.

The Court: All right.

Mr. Rassner: No questions.

The Court: That is all.

Mr. Gray: Just a minute. I want to ask him another question. I just found something—

By Mr. Gray:

576

Q. Now, Mr. McAllister, you had been employed by the Whale Oil Company in Brooklyn from October, 1949, to March, 1950? A. That is right, Mr. Gray.

Q. Do you know what your rate of pay was there?

A. Yes, sir. \$35 a week.

Q. What duties did you perform for that? A. I was a ticket clerk, the technical title they gave you—a ticket clerk, which included a lot of filing and keeping track of the system, of what they call weather control.

Q. Now, then you were employed by the City of New York, the Department of Welfare, from April 10, 1950, to October 14, 1950? A. Yes, sir.

Q. What character of work did you perform for them

Robert A. McAllister—Recalled, cross.

577

there? A. I was a transcribing typist for the Department of Welfare.

Q. And how much—what was your pay? A. \$40, Mr. Gray.

Q. \$40 a week? A. Yes, sir.

Q. And then you went with the United States Army Quartermaster Corps at 111 East 16th Street on November 2, 1950, to June 6, 1952; is that correct? A. That is correct, Mr. Gray.

Q. And what duties did you perform there? A. I started off as a voucher clerk in the voucher unit. My pay was \$47 a week. Upon the termination of my employment I was a cost and statistical clerk earning approximately \$62.50 a week.

578

Q. And that went up to June of last year? A. That is right, sir.

Q. And then you were with Gibbs & Cox, Incorporated, at 21 West Street, from June 9, 1952, up to now? A. Not up to now, no, sir.

Q. But up to the date of your interrogatories? A. That is right, sir; yes, sir.

Q. What did you do there? A. I was a typist-stenographer, and taking technical dictation. It was a marine engineer and naval architect concern, and I earned \$54.75 a week.

579

Q. Why did you leave the Quartermaster Corps to take a job at less money? A. Well, Mr. Gray, you see, I wasn't a permanent employee of the United States Government.

Q. I see. A. I was a temporary indefinite.

Q. Are you employed at the present time? A. Yes, sir. Just—yes, sir.

Q. What type of employment have you now? A. Now I have a job in Pennsylvania that I started last Thursday, and it is—DeMarco Motor Company is the name of the organization, and I make \$45 a week there.

580

Robert A. McAllister—Recalled, cross.

The Court: Doing what?

The Witness: Bookkeeping it is going to be, your Honor.

Q. Have you an opportunity there to study bookkeeping and accountancy? A. Well, that is what I am hoping to try to—I am trying all along to further my education.

Q. You have some bookkeeping and accounting knowledge? A. Well, I had some from the government. I got cost accounting knowledge there, yes, sir.

581

Mr. Gray: All right.

Mr. Rassner: No questions.

Mr. Gray: That is all, your Honor.

The Court: What was the name of the ship you were on?

The Witness: The Edward B. Haines, your Honor.

The Court: And you were approaching the China coast, were you?

The Witness: That is right, sir. We eventually went to the China coast.

The Court: Now, what cargo were you carrying?

582

The Witness: To the best of my recollection, your Honor, I believe it was trucks and supplies, flour, and materials of that sort, but it wasn't really within my province to really notice that.

The Court: No, but when you reached Hong Kong, or Shanghai, that cargo was taken off your boat, wasn't it?

The Witness: That is right, your Honor, yes.

The Court: Now, who did it?

The Witness: Well, I think part of it was done—the deck department hired some of the shoreside labor there, and they hired them to chip the decks, for them, also.

The Court: Were they coolies? Coolies, were they?

William B. McLeod—Direct.

583

The Witness: Yes, your Honor.

The Court: Chinese?

The Witness: That is right, sir.

The Court: From the port?

The Witness: That is right.

The Court: They came on—

The Witness: That is right, your Honor.

The Court: Did they eat there?

The Witness: Your Honor, I could not say whether they ate aboard the vessel or not.

The Court: You don't know?

584

The Witness: No, sir.

The Court: But they did use the latrine?

The Witness: Yes, your Honor, they did.

The Court: All right.

Mr. Rassner: I have no further questions.

The Court: That is all.

(Witness excused from the stand.)

Mr. Rassner: Now, I would like the purser to take the stand.

Mr. Gray, you were supposed to produce him.

Mr. Gray: The purser?

Mr. Rassner: Yes.

Mr. Gray: He can't be here until tomorrow morning.

585

Mr. Rassner: Well, I have another witness.

Mr. McLeod.

WILLIAM B. McLEOD, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. McLeod, where do you live at the present time?

A. I live in Paterson, New Jersey.

Q. With your wife and family? A. Yes, sir.

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William B. McLeod—Direct.

Q. Were you subpoenaed by the respondent, the United States of America, to be here today? A. Yes, sir, I was.

Q. And you have the subpoena with you? A. Yes, sir, I do.

Q. You have testified on behalf of Mr. McAllister in the previous trial, have you not? A. That is right.

Mr. Gray: That is objected to, as to how he testified. He testified that is all.

The Court: All right.

Mr. Raszner: All right.

587

Q. Were you on the Edward B. Haines as a seaman at the same time that Mr. McAllister was there? A. I was signed on the Edward B. Haines as an oiler.

Q. Is that the only time you had any association with Mr. McAllister? Was it during that voyage? A. That is right.

Q. You had no personal friendship with him outside of being a shipmate? A. That is right.

Q. Is that correct? A. That is correct.

Q. Now, do you know under what circumstances Mr. McAllister left the ship on December 1, 1945? Yes or no? A. Yes, I do.

588

Q. Will you please tell his Honor just what you know about Mr. McAllister leaving the ship, and the circumstances which led up to it? A. Well, when he left the ship, your Honor, I think he left in the morning, the early part of the day, and he was helped off by two Army medical corps men, or Marine corps men, I don't remember which.

The reason I am sure about that is that I was called, because he was my watch engineer, and I did want to say goodbye to him.

The Court: What date was that?

The Witness: That was about December 1, 1945.

Now, I was on watch. The second engineer's watch was Mr. McAllister's throughout the trip.

William B. McLeod—Direct.

589

Q. Keep your voice up, please. A. And then on the voyage from Hong Kong to Shanghai, that is, our second voyage, Mr. McAllister at that time complained of feeling bad.

Mr. Gray: That is objected to as not binding upon the respondent.

Mr. Rassner: I think it is, your Honor.

The Court: I will allow it.

Go ahead.

The Witness: He was complaining of feeling bad at that time, or feeling stiff, not being able to get around as he should.

590

Before that he was quite a jolly fellow, and he was really a nice fellow to be around.

In the engine room if you get some-body like that, and if they disappear you immediately notice it.

Mr. Gray: I can't hear you.

The Court: Go ahead, and speak louder.

The Witness: So, anyhow, he complained of feeling bad.

Then we made the trip up to Shanghai. Well, at Shanghai—my watches on that trip were from 12 midnight until 8 in the morning.

Now, through that trip, through the port watches in Shanghai, the only time I would have occasion to see Mr. McAllister is if he was on the security watch.

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The Court: Well, you had been to Hong Kong, hadn't you?

The Witness: Yes, sir.

Now, I am back at Shanghai.

The Court: Now you are going back to Shanghai?

The Witness: Yes, sir.

The Court: All right.

The Witness: So in Shanghai we were on the—I was on the 12 midnight until 8 in the morning watch.

The only time that I would see Mr. McAllister there is when he was on security watch, and I talked to him on those security watches at different times, and he told me there that he was feeling bad, and he also complained, your Honor, of just not being able to get around, or do the things he used to do.

The Court: At Hong Kong did you deliver any cargo?

The Witness: Your Honor, I think we went to Hong Kong to pick up flour, or discharge flour, or something of that sort. At that time I would say we had a couple of hundred Chinese soldiers aboard the ship.

Now, if we went to Hong Kong just to get the soldiers on I don't know, but we did take the soldiers to Tsingtao, including the cargo of flour, too, we took that to Tsingtao.

The Court: From Hong Kong?

The Witness: Yes, sir, but we went back to Shanghai, and I don't know what we did at Shanghai, and I don't know if we loaded flour or got more troops, or just what we did, but we remained in Shanghai several days.

The Court: All right.

Q. Now, when did you first observe that Mr. McAllister was not standing his watches? How long before he left the ship? A. How long before he left the ship?

Q. Yes. A. I would say a week or ten days.

Q. Who was standing his watches? A. Well, there were several engineers that was interchanging around there. We had a junior aboard ship. He stood some watches. The deck engineer stood some watches. But I am sure that the First Engineer came on my watch, and I think the junior engineer stood the First Engineer's watch.

Q. Will you let us have their names, please? Can you recall the names? A. The First Engineer was Fred Bullis.

I believe his second name was Bullis. But the junior engineer was a comparatively new guy aboard the ship, and I don't remember his name.

Mr. Gray: Kavanaugh? Was it Kavanaugh?

The Witness: Kavanaugh—that is right.

Q. What did you observe about Mr. McAllister during the week or ten days before he left the ship? A. Well, I didn't have occasion to observe him the full time, but, like I say, the times he was in the engine room, he didn't—he wasn't the same person that he was before.

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Q. Can you tell us what you observed about him that was different? A. Well, he was kind of lifeless. He didn't do his work. He was just only there.

Q. And you say that that condition existed for about a week or ten days before he left the ship? A. Easy that.

Q. When you say "easy that" what do you mean by that? A. Well, he was feeling bad on the trip up from Hong Kong to Shanghai.

Q. Is that the first time you observed that he wasn't up to par? A. Yes.

Q. On the trip from Hong Kong to Shanghai? A. On the trip from Hong Kong to Shanghai, yes.

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Q. Now, can you tell us about any notices being posted aboard the ship? A. Well, any port, wherever you go in the world—

Q. No; tell us what happened on this ship.

The Court: Tell us what happened on this trip.

Q. On this ship, on this trip, were there any notices posted? A. Oh, yes.

Q. What type of notice? A. A notice was posted that we weren't supposed to drink water ashore from any common restaurant. That we should get our water from specified places when we were ashore, like the Seamen's

Club, or the Park Hotel, or there is one hotel there where all the soldiers were, where the water was purified.

We were not supposed to eat at any restaurant. We were only supposed to eat in certain places, because there was diseases ashore, and there was diseases mentioned.

Q. What diseases were mentioned? A. Polio as one; virus was another one. And then we were particularly cautioned not to do any drinking, because of a blindness that was caused by this vodka, or whatever it was they were selling there at that time.

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Q. What part of the ship had these notices posted? A. Well, in the mess hall, what we call the mess hall, that is, crew mess, there is a little board, two feet square, approximately, and any notice that would come aboard, the purser would bring it down and put it on that board. And there was also one in the officer's mess too, on the same boat.

Were you present at any musterings where the master gave you these instructions orally? A. No.

Q. Did you get any oral instructions from anybody? A. No.

Q. Not to eat ashore? A. Yes.

Q. You just know about the postings? A. That is right.

Q. Of the bulletins? A. Yes.

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Q. As to the toilet facilities, the crew and the officers had their toilet facilities below deck. Isn't that so? A. The crew had their's—their's was separate from the officers'.

Q. That was below deck, was it not? Below the main deck? A. Oh, yes, that was below the main deck.

Q. Were any steps taken to prevent, and were the shore people prevented from using those toilet facilities? A. No.

Q. Did the shore people use the toilet facilities which were supposed to be reserved for the officers and the crew? A. Yes, until the Chinese Army came aboard.

Q. And about when was that? A. Oh, that is hard—that was the truck drivers, and part of the Army, whatever they were. They were aboard in Shanghai, before we went to Hong Kong.

Then there was this little hut was built, and this trough was put in this little hut so that they could use it, because, I mean, there was so much squawking and hollering, and what not, about different people using our toilets and baths, and you could not get in there yourself to use them. They were dirty and filthy, and they just had to build this place.

Q. Well, now, after this trough was built on this main deck, were your toilets still being used by shore people? A. Oh, yes.

Q. Was anything done to lock those toilets, or to prevent them from using them? A. Well, the ones that had keys to them were locked, yes.

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Q. How many were locked? A. Well, we only had two in there—two for us—two for the black gang. I imagine both of them were locked.

Wait a minute, I am not even sure that there were two. I think there was one shower and one toilet. That would be for the black gang. Then the deck department would have their shower and their toilet.

Q. Did you find various members of the shore gang using different parts of the vessel, both on deck and below deck, although they did not belong there? A. You could not keep them out.

Q. Were they there? A. Yes, sir, they were there.

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Q. Did you actually see them with your own eyes? A. Yes, sir.

Q. Using the crew's toilet facilities and officers' toilet facilities, coming down below deck, into the mess room, and every place else on board ship? A. Oh, they were in the mess room, because once you turned your back they would sneak right in to get coffee or food, whatever they could get.

Q. Did you actually see them? A. Oh, yes, sir.

Q. You saw these shore people all over the ship? A. That is right.

Q. Throughout the time you were in China? A. Yes, sir.

Q. Or in Chinese waters? A. Then, not only that—

Q. Is that correct? A. That is right, sir.

Q. Go ahead. A. Not only that. When the Army and the truck drivers came aboard, they were at that time, members of that Army, and truck drivers, they were assigned to our kitchen, or the cooks, and they prepared their food in their kitchen, and served it to the truck drivers and the Army out on deck.

Q. Now, the trough that was built on the main deck, which led over the side of the ship, were the feces and urine and waste material just carried across the deck in the open? A. Yes.

Q. No covering of any kind? Is that right? A. I would say yes. I am not sure, but I would say yes.

Q. Is that your best recollection? A. Yes, that is right.

Just one moment, please.

Mr. Rassner: Your witness, Mr. Gray.

Cross Examination by Mr. Gray:

Q. How long was this trough? A. That is hard, Mr. Gray. I would say six, eight, ten feet.

Q. And it was over at the edge, or at the side of the deck, was it not? A. No. There was a passageway in back of this little hut.

Q. What do you mean by in back of the hut? You mean there was a passageway between the hut and the side of the ship? A. Yes.

Q. And was there a pipe—you had to step over a pipe, didn't you, to get over? A. No. A trough. A wooden trough.

Q. You just stepped over the trough? A. That is right.

Q. And this was covered by a wooden hut? A. Where they actually went to do their business was a wooden hut, yes.

Q. A wooden hut? A. Yes.

Q. And that came within how many feet of the rail?
A. That is hard. I would say three or four feet.

Q. And there was a stream of water running through that all the time, was there not? A. When we could keep it there, yes.

Q. Well, you could keep it there all the time, could you not? A. Not all the time, no. We had a considerable amount of trouble with that stream of water.

Q. You mean someone would turn it off? A. Yes, sir.

Q. And didn't you take the handle off of the valve stem so that it could not be turned off? A. I think that was one of the later measurements.

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Q. Now, you were a pretty good friend of McAllister, weren't you? A. No.

Q. Well, didn't you like him pretty well? A. Yes, I liked him as an engineer.

Q. He treated you all right, didn't he? A. As an engineer, yes.

Q. Well, didn't he treat you all right as a human being? A. Yes.

Q. Why do you qualify it by "as an engineer"? A. Because aboard ship it is not the practice that the engineers and the crew members, or the officers and the crew members, establish such a friendship as you speak of, as to be good friends.

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Q. That is, there is a certain class distinction? A. Yes, sir, there is.

Q. And as such you did not go up into the officers' quarters at all unless you were requested to go up there? A. I would only go up by request, or if I went to visit someone there, or something of that sort, or if I was wakening them, or—

Q. Well, how were you able to state that the officers' toilet facilities were not locked? A. Did I state that?

Q. Well, let's find out what the fact is. Were the officers' toilet facilities locked? A. I could not say.

Q. And could you say whether anyone other than the

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William B. McLeod—Cross.

officers used the officers' toilet facilities? A. I could not say.

Q. Now, you went and visited Mr. McAllister when he took to his bunk, did you not? A. Yes, sir, I did.

Q. After he felt sick and took to his bunk, and didn't come to work any more? A. Yes, I did.

Q. Now, when was the first time that you visited him in his bunk, while you were at Tsingtao? A. I think I only visited Mr. McAllister once while he was in his bunk.

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Q. And that was at Tsingtao? A. No. That was in anchorage in Tsingtao.

Q. In anchorage in Tsingtao? A. Yes, sir.

Q. That was before you made the pier? A. That is right.

Q. And that was the first time you had heard that he was taken to his bunk? A. No, no. I was aware that he was sick before that.

Q. No; I didn't ask you that.

Mr. Rassner: I beg you pardon. You did ask him that.

Mr. Gray: I said bunk.

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Mr. Rassner: Well, I think you asked him the very question which he answered.

The Court: Go ahead.

Q. Now, that was the first time that you visited him, after you heard that he was taken to his bunk? A. That is the first time I visited him and the only time.

Q. And that was in the roadstead of Tsingtao? A. Yes, sir.

Q. After you had come to anchor? A. That is right.

Q. And that would be some time after 5:30 p.m. on November 25, 1945? I understand that the vessel anchored in the roadstead at 5:30 p. m. on—no—at 10:30 a.m. on November 25th. It was some time after that? After you had come to anchor? A. Yes.

Q. Now, on the trip from Shanghai up to Tsingtao you also noticed that Mr. McAllister was weak and lackadaisical? A. I did not see him.

Q. Didn't he stand his watches— A. No.

Q. Just a minute. You are in a little bit too much of a hurry. Didn't you see him stand his watches from Shanghai to Tsingtao? A. No.

Q. Didn't you testify at the prior trial that he stood those watches? A. No.

Q. Have you read over your testimony that you gave in the trial in the Southern District of New York within the last two or three days? A. Have I read over it?

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Q. Yes. A. Yes, sir, I have.

Q. When did you read it? A. I read that in Mr. Rassner's office.

Q. When? A. Monday.

Q. Monday? A. Yes, sir.

Q. Of this week? A. Yes, sir.

Q. And you discussed the case with Mr. Rassner then? A. No, sir.

Q. You did not discuss it with him? A. He only asked me to read my—

Q. And you read it and left the office? A. No. I come from there to this court with him.

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Q. Well, you have discussed the case with Mr. Rassner, haven't you? A. No.

Q. Not at all? A. Not in reference to anything like that.

Q. Well, didn't you discuss the case with reference to your testimony? A. No.

Q. I call your attention to your testimony at page 352 of the prior record, and ask you if you were not asked these questions and if you did not make these answers:

(Reading) "Q. Do you know whether or not Mr. McAllister at any time stopped standing his watches?

A. Yes, sir, I do.

"Q. Where was the vessel at that time? A. When he stopped standing his watches? I remember very distinctly when we were at anchorage—

"Q. Where? A. When we were at anchorage in Tsingtao; from then on I know positively that Mr. McAllister didn't stand his watches. Before that there was an interchange of engineers, two or three different interchanges, and I don't remember whether he was standing his watches."

Do you remember so testifying? A. Yes, I do.

Q. And then do you remember testifying to this effect on the same page:

(Reading) "Prior to the time of anchorage at Tsingtao there had been other engineers sick on the ship and wasn't standing their watches, and I don't remember just exactly who was standing whose watch at what time there. But at the time we were anchored in Tsingtao Mr. McAllister wasn't standing his watches."

Do you remember so testifying? A. Yes, sir, I do.

Q. And then were you not asked this question, and did you not make this answer, as recorded on page 353 of the record:

(Reading) "Q. Where was the vessel the first time you went up because you heard that Mr. McAllister was sick? A. In anchorage in Tsingtao."

And then the next question:

(Reading) "Q. In anchorage at Tsingtao? A. Yes, sir.

"Q. You didn't see him in his bunk while the vessel was at Shanghai? A. No, sir, I didn't. I

didn't have any occasion to go up because, as I say, we don't hang around together. The question is about a man sick or something, I found out that he was sick, so I went up to see him."

Do you remember those questions and answers? A. I don't think I understand just what you mean right there, Mr. Gray. Do you mean did I go to see him at Tsingtao in anchorage?

Q. No; I am asking you whether or not you were not asked these questions and made these answers at the prior trial. A. Yes, sir. I mean if that is what the book says.

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Q. Yes. I am reading the record of the questions and answers in your testimony. Do you recollect making those answers to those questions? A. The particular questions that you asked at that time, I am sorry. If the book says I made the answers, then I made the answers.

Mr. Rassner: I will concede that Mr. Gray is reading the record correctly.

The Court: Yes.

The Witness: Yes.

Q. Now, on the same page were you asked this question and did you make this answer: 621

"Q. What is your best recollection as to how many days before Mr. McAllister left the vessel that you saw Mr. McAllister in his bunk? A. I would say five days."

A. Well, would that be about right? Five days?

Q. I think that is about right. Isn't that what you said?

A. I said I saw him in his bunk sick.

Q. Yes. A. Five days prior.

Q. Five days prior? A. Yes.

Q. You stayed on with the ship, did you not? A. Did I stay aboard the ship?

Q. Did you stay on with the ship? A. Yes, sir. I finished the trip.

Q. And you finished the trip back to New York? A. Yes, sir.

Q. During the rest of that voyage did anyone else aboard the ship contract polio and leave it? A. No, sir.

Q. Now, what do you mean by the security watch? A. A security watch is like when a ship docks or goes in anchorage in a port, and they know that they are going to remain there several days, they break sea watches. Then the engineers goes on day watches. If so required the oilers go on day watches, which only leaves the fireman in the engine room. In the case of that ship both the oiler and the fireman remained in the engine room through the security watches. Now, if engineers were assigned to day work at that time, the fireman and oiler were assigned to eight-hour shifts aboard the ship.

Q. That is, the engineers were assigned to eight-hour shifts? A. Eight hours a day, yes, sir, working eight hours a day, yes, sir. Eight until four.

Q. So if Mr. McAllister on the 26th of November, 1945, stood a watch in the engine room from midnight to 8 a. m., that would be what you call a security watch? A. That would be a security watch, yes, sir.

Q. What is your employment now? A. What is my employment now?

Q. Yes, sir. A. I am an engineer for the Cliffside Dye Corporation, Paterson, New Jersey. My classification is fireman and mechanic, but I hold a State Engineer's license for that job.

Q. Do you hold any sea licenses now? A. No, sir.

Q. You never got a third mate's— A. No, sir.

Q. I mean a third assistant's— A. No. I have a junior endorsement. I went to school, but I never stood my examination for the license.

Testimony.

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The Court: Is that all?

Mr. Gray: That is all.

Mr. Rassner: No further questions.

Mr. Gray, will I have to call the union officials with the contract to show what the engineers are getting now? The chief engineers and Seconds?

Mr. Gray: You mean as of today?

Mr. Rassner: As of today.

Mr. Gray: I have the union contract as of 1945.

Mr. Rassner: No. I am talking as of today, for the purpose of future damages, if the Court should find in favor of the libelant. I want to show what the loss of potential earnings is as compared to what engineers get, and the type of man that McAllister is.

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I believe we have the authorities, particularly the decision of Judge McGohey in the Southern District, that you can take into consideration what other men are earning at the time of the trial, and the type of man that the Court observed, as to whether or not the Court feels that the man's earnings would increase by this time, on the items of damage.

The Court: You mean you want me take expert testimony on the damages?

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Mr. Rassner: No, not expert testimony. There is a contract in actual existence today as to what engineers are getting, so that that would establish the loss of earnings that McAllister has suffered.

The Court: The way I look at it, there being no jury here, the more information you can give me the better. Whether I adopt it or not is another thing.

Mr. Rassner: Of course.

The Court: That applies to both sides.

Mr. Gray: I will tell you what I will do. If Mr. Rassner will give me a list of the wage scales which he says are now in effect I will find out as quickly as I can—

Testimony.

The Court: Surely.

Mr. Gray: And if they are correct I will agree to them.

Mr. Rassner: Yes. That will obviate my actually calling the man in person—

Mr. Gray: Yes.

Mr. Rassner: —who will produce the records at the trial.

The Court: You see, that might be an important finding of fact for me.

Mr. Rassner: Yes.

The Court: And I have to have a good basis before I find any facts.

Mr. Rassner: Therefore I want to know from Mr. Gray whether he would object to my producing the paper itself without having a man here to testify to the truth of its contents.

The Court: We can arrange that the same as in a pretrial.

Mr. Gray: I haven't seen it. I would like to see a copy.

Mr. Rassner: I will send it down to your office.

The Court: That will be subject to your being satisfied that it is correct, and it will obviate the necessity of bringing a witness in.

Mr. Gray: Oh, of course.

Mr. Rassner: Then with that the libellant—I think we will rest now, with that—

The Court: Well, I am going to take a recess now until 2:30, because I have a pretrial on at 2:00.

(Discussion off the record.)

The Court: We will take a recess until tomorrow morning at 10:30.

(Adjourned until Thursday, January 15, 1953, at 10:30 a.m.)

Philip M. Stimson—Direct.

Brooklyn, New York,
January 15, 1953.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED

Mr. Gray: Dr. Stimson, please take the stand.

The Court: Let me understand this. Has the libellant rested?

Mr. Rassner: No, your Honor. I am consenting, however, to Dr. Stimson being called out of turn.

The Court: All right.

Mr. Gray: I understood that Mr. Rassner rested yesterday afternoon.

Mr. Rassner: No. If I gave that impression, I want to modify it. I have not rested.

Mr. Gray: All right.

PHILIP M. STIMSON, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Dr. Stimson, where do you reside? A. 25 Claremont Avenue in Manhattan.

Q. Are you a duly licensed—

Mr. Rassner: I will consent to his qualifications.

Mr. Gray: No; I want to show the doctor's qualifications on the record. Thank you just the same, Mr. Rassner.

The Court: All right, go ahead, please.

Q. Are you a duly qualified, licensed, practicing physician of the State of New York, Dr. Stimson? A. Yes.

Q. Have you had any experience in the diagnosis and treatment of poliomyelitis? A. Yes.

Q. Will you please state to the Court what your experience on that subject has been? A. First, I have been attending physician at the Willard Parker Hospital since 1919, and since 1931 I have seen a large number of poliomyelitis cases every year.

Q. What is the Willard Parker Hospital? A. It is Manhattan Island's Municipal Hospital for contagious diseases.

635 In addition to that I have taught poliomyelitis to medical students, oh, practically since 1919.

The National Foundation for Infantile Paralysis had a demonstration service at the Knickerbocker Hospital from 1945 to 1949, which I organized and directed, and during a period of five years, including that period, I lectured something over 300 times on poliomyelitis to all sorts of groups.

My present hospital connections—

Q. Pardon me for interrupting, Doctor. Did those groups include physicians? A. Oh, yes. It included a section of the American Medical Association, the American Academy of Pediatrics, the American College of Physicians, and many hospitals and medical societies.

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My present hospital connections include—I am consulting pediatrician at five hospitals, my appointments being given because of my polio connections.

Well, I think that is enough for that.

I knew Miss Kenny, Sister Kenny, quite well, and in fact she dined in our home on one occasion.

I had the privilege and opportunity of meeting her first in the summer of 1941, soon after she came over here, and I invited her to make rounds with me at the Willard Parker Hospital, which she did, and she impressed us with her knowledge of muscle anatomy and muscle function, and with some of her ideas, so that that September the house

staff under my direction started the first imitation of the Kenny treatment that was started in the eastern states. It was started in Minneapolis shortly before.

The Court: Were you a witness in the other trial?

The Witness: Yes, but some of this was not brought out on the other trial.

The Court: She was there too, wasn't she?

The Witness: Yes, but I was not present when she testified. I would like to have been.

I have talked with her on a number of occasions, and in fact when Life magazine wrote a review of the film Sister Kenny, Life asked me to see it in a preview and write a commentary on it, which they published, and I have a copy of that number of Life present.

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I knew Sister Kenny quite well, and in fact I talked with her on a number of occasions, taking her to task for some of her statements. One of them said, or, she told me, that she cured 88 per cent of her patients.

I asked her, "Don't any of your patients die?" And she said, "Oh, yes, but I don't count them, of course, because they haven't had the Kenny treatment."

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I said, "Don't you have many patients that leave the Kenny Institute badly crippled?"

She said, "Oh, yes, of course, but we don't count them, because they don't stay until we finish their treatment."

I said, "What do you mean by cured—curing 88 per cent of the patients?"

And she said, "Oh, they are able to walk out of the hospital."

It just happened that in the current number of the Journal of the American Medical Association

there is an article of Marion Knapp, who has been the head of the physical therapy in the Kenny Institute in Minneapolis, partly, since it was opened, and he reports the results of follow-ups on as many patients as he could follow up.

I have the article here if anyone wants to see it.

And he reports the results, which are in no way different from those of any other hospital.

So that the Kenny treatment per se does not—it is generally understood that it does not save patients from weakness. What it does is make them more comfortable and perhaps prevent bad treatment—faulty treatment.

The Court: All right.

The Witness: Is that enough on qualifications?

The Court: I think so.

Q. Doctor, what degrees do you hold? A. B. A. from Yale and M. D. from Cornell.

Q. Where did you intern, Doctor? A. At the New York Hospital, and then at the St. Louis Children's Hospital.

Q. What is your age? A. Sixty-four, I think.

Q. And for how long have you been practicing medicine, including poliomyelitis cases? A. Since my return from the first war, which was in the spring of 1919.

Q. Can you give us a reasonably accurate estimate of the number of poliomyelitis cases that you have treated in your career? A. Well, it depends upon what you mean by treated. If you mean those that I treated from the onset of the disease until they were completely rehabilitated, I would say that the number was perhaps 300, most of those being those which we saw at the unique service at the Knickerbocker Hospital where we had the opportunity of taking them in the acute stage, and keeping them there until they could go home.

Very few doctors have the opportunity of seeing a patient from the onset of the illness until he is completely

rehabilitated, because the patient is under one doctor for awhile and another doctor for something else, and under another doctor for something else.

So that my opportunity, you might say, in that line, has been unique.

The Court: What do you mean by rehabilitated?

The Witness: By that I mean—well, may I take a minute now to go over the chart, and answer that completely later?

The Court: Yes.

Mr. Gray: I will just take—

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The Court: I am just interested—

The Witness: I read the testimony of some other doctors in this trial, and I was confused by it, and I would like to clarify it, if I may.

The Court: Yes.

Go ahead, Mr. Gray.

Mr. Gray: May I ask you, Doctor, to please explain to his Honor the normal development and stages of the typical case of poliomyelitis, resulting in paralysis?

The Witness: Yes. I have a chart here which I think will simplify it.

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Mr. Gray: Have you prepared this chart at my request, Doctor?

The Witness: I prepared this chart at your request.

Mr. Gray: May I offer it in evidence and ask that it be marked?

The Court: Any objection?

Mr. Rassner: No objection.

The Clerk: Respondent's Exhibit I.

The Court: The Clerk will mark it in a few minutes.

Mr. Gray: So that we can refer to the chart as Respondent's Exhibit I?

The Court: Yes, you may refer to it as Respondent's Exhibit I.

(The chart referred to, which was placed upon an easel, was marked Respondent's Exhibit I in evidence.)

Q. Will you answer the question, Doctor, please. A. In the first place poliomyelitis is an infection which requires a certain length of time to develop from exposure to the onset of clinical manifestations. That period we call the incubation period.

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It has been known to be as short as three and a half days or as long as, in one instance, 35 days, I believe. Dr. Ward will testify later as to that more accurately, but the usual time is about 10 or 12 days.

The Court: It is a bug, isn't it?

The Witness: It is a virus.

The Court: A virus?

The Witness: Yes.

The Court: I mean it has a form, hasn't it?

The Witness: Not that you can make out with a microscope, except with the electronic microscope.

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The Court: But it is there?

The Witness: Yes.

The Court: It is a body?

The Witness: It is only recently that it has been possible to see it.

The Court: Yes.

The Witness: That is right, your Honor.

Now, the incubation period, then, runs from the exposure (indicating), here, to the onset of fever.

The Court: Yes?

The Witness: A few people during this period have a little preliminary fever which is sometimes called a prodromal manifestation, but most people don't have that. We have the onset of fever, which

lasts, in the average case, six to seven days, here (indicating on chart).

The Court: That is when the bug—I refer to it as bug, which is not medically correct—I will say that is when the virus, if you want to put it that way, is in the blood stream?

The Witness: No, your Honor. By this time it has reached the central nervous system.

It is only recently that it has been realized that the virus does get into the blood stream, and that is during the incubation period.

The Court: All right.

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The Witness: But it reaches the central nervous system before the onset of fever.

The Court: All right.

The Witness: But then it accumulates so that it is able to cause fever and other manifestations, notably, headache and fever, as I said, and some pain and tenderness.

The term used in this trial has been spasm, but spasm to some people means a cramp. We don't mean a cramp. We mean tightness of muscle; chronic tightness. It is not a cramp. So I prefer to use the words muscle tightness to spasm.

651

Now, the red here (indicating on chart, Respondent's Exhibit I), is the presence of pain and tightness. It appears pretty much with the fever and lasts until well into the chronic stage.

Now, on the second or third or fourth or fifth day of the fever, muscle weakness usually appears. It may not appear until the eighth and ninth day, but usually on the second to the fifth day muscle weakness appears, and in some cases it has disappeared in ten days. In other cases it lasted for life.

Now, during the fever and for a few days afterwards the final spinal fluid may or may not be abnormal. Its abnormality is not proof of the

diagnosis of polio. All it means is that there is something wrong with the central nervous system. It does not mean that it is polio, because you can get exactly the same spinal fluid in other diseases of the central nervous system. So if you have an abnormal spinal fluid, all we know is that you have something wrong with the central nervous system.

But in polio you can have a normal spinal fluid throughout.

So that the only value of doing a lumbar puncture is to rule out meningitis, which is a serous disease requiring immediate treatment, and perhaps to prove that you have something wrong with the central nervous system, but in many cases of polio we know that we have something wrong with the central nervous system, and we don't need that additional proof.

So that the nature of the disease is involvement of the central nervous system, shown by a number of manifestations, of which headache and fever and pain and tightness of the muscles are rather characteristic, and in a few of the cases weakness develops—comparatively few—but those are the conspicuous cases—those where the weakness develops.

Now, weakness needs a little explanation. Each muscle that we have is supplied by thousands of individual nerve fibres, each nerve fibre having a cell in the spinal cord; a neuron they call it.

The virus of polio kills some of these neurons in a very hit or miss manner. It makes others sick. And some it doesn't affect.

Now, it can kill five per cent, and we never know the difference. We have a surplus.

There can be 10 per cent—on the other extreme there can be 10 per cent surviving, but we don't know it.

It is so little that we can't telephone through to

that 10 per cent to make it contract, and we think we have complete paralysis, but in polio we have all stages of weakness, depending on the percentage that is killed, the percentage that is sick, and the percentage that is unaffected.

Now, the sick ones are going to get well of their own accord no matter what we do and no matter how we treat them.

We don't know of any way at all of doing anything that is going to affect the health of those sick ones except perhaps to make sure that they have enough oxygen, and if a person is breathing normally, they have enough oxygen. It is where a person is having trouble breathing that we have to make sure that they get enough oxygen.

656

The dead cells nothing under heaven can bring back to life.

Neither Sister Kenny's treatment, nor any other treatment that we know of, can bring dead cells back to life any more than we can bring a dead person back to life, and once the virus has reached these cells we have no drug, medicine, or treatment, that will in any way hit the virus in those cells, and the virus gets there by the time the fever begins, so that doctors are essentially helpless in the treatment of acute polio. There is no medicine, no drug, no antibiotic, no serum, that will touch that virus in those cells, and the virus is already there at the time of the onset of the fever.

657

The Court: One of the doctors the other day said, here, as I remember it, that possibly in a couple of years they will find a serum.

The Witness: Well, we hope.

The Court: That is what you hope?

The Witness: Well, we have now a—

The Court: But you haven't any such serum now?

The Witness: Well, in the last year it has been shown that a product made from human serum, called gamma-globulin, if it is in a person at the time the person is infected, it may prevent the virus from going on and reaching the central nervous system, but it is no good after the virus has already reached the central nervous system. It may prevent its going to it. And there is a lot of furor in the papers about gamma-globulin having prevented polio; not for treatment.

659

Am I clear so far?

The Court: Then they would add that to one of the inoculations eventually?

The Witness: Yes, but only when it is an epidemic. Only when there is an epidemic. It is still too expensive and too scarce to give to everybody the year round.

The Court: I understand.

The Witness: It is quite expensive.

Now may I talk about the Sister Kenny treatment as it applies to this?

The Court: Yes.

660

The Witness: The Kenny treatment consists of four points.

The first one is to discard immobilizing the patients.

Before 1940 it was customary in most hospitals—not all—that when a patient came in they put his arms or legs in casts, because it was thought that the pain and tightness would be—the pain particularly was lessened if you put the arm or leg at rest.

Sister Kenny said, “Don’t immobilize the patients.”

Now, she was wise in that, because immobilizing when carried on too long, increased the stiffness and tightness rather than decreasing it.

The second thing about Miss Kenny’s treatment—

and incidentally there were a number of hospitals that were not immobilizing patients anyway, which I could quote.

And the second thing that she advocated was the use of hot packs for the treatment so-called of the spasm.

Now, moist heat has been used for many years for the treatment of **pain**.

I have a pamphlet of the City Department of Health, published in 1900 and—or, when Dr. Wynn was Commissioner, which was about 1930—advocating the use of hot packs for polio before we ever heard of Sister Kenny.

662

So that she advocated the use of hot packs, and it had not been done very much before that, but after she advocated it, and we tried it at the Willard Parker Hospital, and they tried it at Minneapolis, I would say it was more generally used.

I might say at this time that the National Foundation asked me to direct and put on a demonstration of the Kenny treatment at the meeting of the American Medical Association in Atlantic City in June, 1942, and at that time I was Chairman of the Section on Pediatrics of the American Medical Association, and my Chairman's address was on the subject of the Kenny treatment, and that demonstration pretty much put the Kenny treatment across in this country. That is, some of these features.

663

The treatment itself was of value, but her theory was wrong, so we did not have Miss Kenny present there. We did have some of her technicians there. We didn't want a demonstration of Sister Kenny. We wanted a demonstration of the treatment.

We had some 3,000 people at the demonstration that week from all over the country, and it was quite valuable.

Now, her hot packs are of value for the treatment of pain.

It is generally admitted that moist heat treats pain. There is no proof that it will relieve tightness, except where the tightness is due to pain. If the tightness is due to pain, and it relieves the pain, then the tightness is relieved.

And more recently we have found that hot tubs are more effective than hot packs, so that hot packs are not used nearly as much in the last few years as they used to be. Hot tubs are more effective. And when hot packs are used, they are not used in accordance with the technique of Sister Kenny, but in a different manner, called the prone packs.

The third treatment of Sister Kenny was an individual muscle training, or re-education, which is good, but almost every physiotherapist the country over has been doing that for 20 or 30 years, except that she carried it to a rather higher degree of perfection than anybody else. Her knowledge of muscle anatomy and muscle function was excellent, and she had a very nice pair of hands. At the bedside she was magnificent. On the speaker's platform she was something else, but she was magnificent at the bedside.

The fourth thing about the Sister Kenny treatment was that she believed in teaching people to walk even though there was practically no strength in their legs at all, but by a method of balancing, without using braces or any artificial means of support, if it could possibly be done. However, there were cases in the Kenny Institute where they did have to use artificial support.

Now, everybody has used hot packs before Sister Kenny, but she popularized them.

Her method of muscle re-education is good, but it doesn't come on until—you don't use that until

well after the fever. We don't begin the re-education of the muscles until the fever is gone and the pain and tightness are mostly gone.

So that in the first stages of the disease the Kenney treatment is really not applicable.

Nowadays when I treat the disease, when I treat a case of poliomyelitis, I tell the family, "The most important thing for this patient is rest. Leave him alone. He hurts to move. Don't move him."

And it has been proven very conclusively that extra fatigue at the end of the incubation period here (indicating on Respondent's Exhibit I), and the first day or two of fever, aggravates the oncoming disease.

668

If a person gets overly tired in here (indicating on Respondent's Exhibit I), and overly tired here (indicating), the disease is apt to get worse. Why, we don't know, but that is a fact.

So that that is the nature of the disease.

I might say at this point that the word polio comes from the Greek, and the word for many is poly, and in the testimony that I read last night of one of the doctors who testified yesterday, it was confused when they spoke of polioneuritis, when they should have said polyneuritis.

669

Mr. Gray: In that connection, your Honor, may I ask that a correction be made in Dr. Di Fiore's testimony which appeared on blind numbered pages 61 and 62, where he spoke of polyneuritis, or where he described the papers which he had written. The reporter apparently made an error there and put in "polio" instead of poly.

Mr. Rassner: That is consented to.

The Witness: There might be some confusion in that because they are two separate and distinct words, but which can sound alike.

The Court: Yes, sir.

The Witness: I think that is enough on that.

The Court: All right.

By Mr. Gray:

Q. Have you written any articles or papers on the subject of poliomyelitis? **A.** I have written quite a number. One of them was with some of my house staff, on the Kenny treatment, which was the first article written in the East on the subject.

671

The second one was on rationalizing the Kenny treatment, for the *Journal of the American Medical Association*, and so on, and the last one of importance was on the Home Care of patients with acute poliomyelitis, which appeared in the *Journal of the American Medical Association* last June, and which has had a very large influence on the treatment of poliomyelitis throughout the country, with patients not being rushed to the hospital as they used to be, people knowing now that sometimes you can hurt a case by the fatigue of a trip to the hospital, whereas if you can keep the patient home, and quiet, he has a better chance of not having any paralysis, and for selected cases home care is better than hospital care.

672

Mr. Gray: Now, in order to save time, your Honor, I gave Dr. Stimson the transcript of the testimony of Dr. Frant and Dr. Di Fiore, and Dr. Stimson has read it, and there are a number of parts of that with which he disagrees, and I think it will save time if he were to refer to the testimony and state in what respects he disagrees, and why.

Mr. Rassner: No objection, Mr. Gray.

Q. First, Doctor, on this question of the first use of the Sister Kenny method in a paralysis case, is that method to be used before—well, Doctor, will you please state at what stage of the progress of the disease, particularly with respect to the muscle tightness, the Sister Kenny method of treatment is first to be applied.

I think you have spoken about it, but I want to em-

phasize it. A. The effect of the hot packs is symptomatic. It relieves pain.

Q. And until there is pain, there is no application of the hot packs?

Mr. Rassner: I object to counsel leading.

Would you mind—I haven't interrupted the doctor, but I object to your making that suggestion.

The Witness: The Kenny treatment that might possibly—the part of the Kenny treatment that might possibly apply to the stage where there is fever, is, first, the non-use of immobilization, and nobody has been doing that for years anyway.

674

And second, the application of moist heat.

If there is marked pain, aspirin and lack of handling is usually sufficient.

Where the pain is sufficient to warrant hot packs we sometimes start it as early as the day after admission to the hospital—two days—the third or fourth day of it, but if it is hot summer weather, and if the patient has a lot of fever, we can't use the hot packs because it adds to the heat.

So that we have to balance in every case whether the benefits of the moist heat are going to be greater than the disadvantages. The only benefit is relief of pain, and in so far as pain is relieved, the relief of tightness.

675

The Court: And your idea is along the line that the best thing to do is to provide rest?

The Witness: The best thing is rest. That is generally accepted now. It is not just my idea, but it is the general treatment.

Q. Doctor, will you also state whether or not the Kenny Hot Pack Treatment is usually used in the absence of a fever? A. Before the appearance of fever one would never use it. Oh, we use it for any backache or any sore neck. If

anyone has a sore back, a hot pack is comforting. Or if anybody gets a crick in the neck, a hot pack is comforting. It is not the Kenny treatment. It is anybody's treatment—any physiotherapist's.

But in the case of poliomyelitis one would not use it—one would use it to relieve pain, whether it was poliomyelitis or not, but most cases of poliomyelitis don't have pain until the actual onset of the fever stage, and then it is a few hours more before they get much pain, and usually not enough to require hot packs for another couple of days.

Q. Now, Doctor, I hand you a transcript of the testimony of Dr. Frant and Dr. DiFiore, in which you have turned down some corners of pages, and ask you to please comment on the particular items with which you disagree, first stating the statement of the doctor in the record so that we will be able to identify it. A. Well, to save time I have copied on a piece of paper some of the points. Would I have to find them in the record?

Mr. Rassner: I don't insist on your finding them. I have no objection to the Doctor having a free hand in making any comments you want.

The Court: That is all right.

The Witness: Thank you.

The Court: Doctor, did you make a memorandum of the pages that you looked at?

The Witness: No, I did not make a memorandum of the page in every case.

The Court: All right, do the best you can.

The Witness: In some cases I have, but not in all.

The Court: All right, you may go ahead.

The Witness: Yes, thank you.

One doctor said that if the patient could not chew, he should have hot packs to the jaw. I have never seen a case of hot packs applied to the jaw.

When a person is having trouble chewing, the involvement is in the fifth cranial nerve, which is

not a bulbar manifestation, and in answering that I must differentiate the types of poliomyelitis for clarity's sake.

The bulbar manifestations which are of importance don't include inability to chew, because the fifth cranial nerve is not a bulbar nerve.

The manifestations of bulbar illness are regurgitation, fluid through the nose, weakness of the tongue, change in the voice, inability to swallow, and secondary to those are involvement of the breathing center. The telephone central for breathing. When that fails we die.

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And also involvement of the center which controls the size of the blood vessels, and when that center fails we die.

So that bulbar cases are significant because of the danger of death and the fact that the patient can't swallow.

Now, I have seen no evidence in this case, and I have read the transcript of the first trial, and the transcript of the testimony of the other two doctors, and I have seen no evidence that this patient had bulbar polio at any time, nor any evidence that he had breathing difficulty. So that this particular case of polio must be considered a spinal case, where the nerves come from the spinal part of the cord to the arms, legs and body.

681

I think that for the purpose of this trial you have to rule that out, and just say that it is a spinal case, so that my discussion, then, will have to do with spinal and not bulbar polio.

Now, the treatment of a spinal case is not a matter of hours or minutes. The important thing is rest in bed, and you can start that at any time. There is no particular method to be applied in a hurry or rush. In fact, we tell people, "Keep your shirt on."

If a patient has to be brought to a hospital, we

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Philip M. Stimson—Direct.

say, "Don't hurry. Go slowly so that the patient won't be fatigued by the drive," and many a patient has been harmed by the rushing to the hospital. They get tired out by it, and in the hospital every doctor comes to see him and works on him the first day, and does him more harm than good. So nowadays we say, "Leave them alone."

683

At another page this patient was spoken of as—or, somebody said, failure to use the proper treatment in the early treatment of polio may lead to widespread degeneration and atrophy of the muscles.

There is no proof of that statement. I just don't agree with it.

Mr. Rassner: I object to that.

Mr. Gray: Just a moment—

Mr. Rassner: I object to the first part and move that it be stricken out. The Doctor gratuitously says there is no proof.

The Court: He says that he disagrees with that statement.

Mr. Rassner: He disagrees with that statement. I don't object to that.

The Witness: No—I disagree—

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Mr. Rassner: The statement of this doctor that there is no proof, when other doctors, eminent doctors, have said that there is proof, characterizes that witness—

The Court: Well, he says he disagrees. Does that cure that objection? Your objection is cured by that answer?

Mr. Rassner: Yes.

Mr. Gray: May I ask the doctor to state the proof which he refers to as lacking? Medical proof, or proof in this particular case?

The Witness: No medical proof.

Mr. Gray: That is, there is no medical proof?

The Witness: No medical proof that failure to apply—

Mr. Rassner: I object to counsel suggesting the answer to the Doctor. I think the Doctor is perfectly competent to testify himself, without Mr. Gray telling the doctor to say that there is no medical proof. I don't think he needs this kind of assistance from Mr. Gray.

The Court: All right.

The Witness: Thank you, Mr. Rassner.

Q. Will you continue, Doctor? A. Another place spoke of the patient as being a seriously sick person.

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One would have to determine what is meant by seriously sick.

At the time the patient was in no way in danger of death.

We have no evidence that he had any fever that I know of.

Subsequently he was able to walk off the ship to the time spoken of.

I would not, personally, have called him a seriously sick person.

At another place the transcript spoke of a dromedary type. What they probably were trying to refer to is the dromedary, or two-hump type of fever.

687

Incidentally, dromedaries only have one hump. It is the camels that have two humps.

But few cases have that preliminary dromedary fever, which is of no significance to the later disease.

The effect of moist heat as described on one of the pages differs from my description of it here.

Moist heat relieves pain, and it has been proven scientifically by a number of different doctors that it does not relieve muscle tightness per se, only in so far as it relieves pain.

At another point one of the doctors said, with reference

to this patient, that he should have two or three years more of rehabilitation, speaking seven years after the onset of this patient's illness.

Rehabilitation is of very little value after four or five years after an acute onset, and I thought that it is too bad to string this young fellow along and make him think that more work is going to do any good for him.

The Court: In other words, you don't think he can be improved?

The Witness: I should doubt very much if he could get any further benefit.

On pages 61-62 it spoke of polioneuritis instead of polineuritis.

A little later it spoke of a spinal tap as being indicative, which, of course, is a misuse of the word. He meant imperative. And it is also spoken of as an emergency measure. It is not an emergency measure. In the opinion of most everybody nowadays all that the spinal tap does is rule out the diagnosis of meningitis, and if the symptoms that the patient presents suggest meningitis, then it is an emergency measure to rule out meningitis, but as far as poliomyelitis is concerned, it is not an emergency measure.

At another place the doctor, one of the doctors, said that the bulb consists of the medulla and the pons.

The bulb is another name of the medulla oblongata, and does not include the pons.

At another place he said the diagnosis of polio is an emergency diagnosis.

What he means by an emergency diagnosis is not defined, but in my concept of an emergency diagnosis, polio — the diagnosis of polio is not an emergency.

You are going to leave the patient in bed. I am talking about spinal polio, and that is the only form

of polio that is involved in this case. This is not a bulbar case, and it is not a respiration difficulty case, and the diagnosis is not an emergency.

He speaks of the Kenny treatment, the treatment given in the Willard Parker Institute: I am reading from the notes — the Willard Parker Hospital. Such Kenny treatment as is done there I have directed, and I have directed what we do. We use hot packs judiciously occasionally. We don't immobilize. The patients are given the standard rehabilitation when they are kept there. Most of them are moved on. But so much for that.

692

"Spasm will eventually result" — I am quoting literally — "Spasm will eventually result in a shortening of that muscle and contracture and lead to deformities."

True. If by spasm we mean muscle tightness.

And the Kenny treatment has done a lot to mitigate contractures and deformities, and by deformities most doctors who have to do with polio mean crooked backs and club feet, and twisted pelvises. They don't mean weakness or atrophy. Atrophy was spoken of as a deformity. It is not a deformity in the usual use of the term.

693

Those are some of the points I picked up in the testimony that has been given with which I think everybody who sees much of polio would differ.

There were many other points, but those were the essentials.

Mr. Rassner: I object to that statement that everybody would differ. That is a gratuitous statement by the Doctor. He is trying to support himself by saying that "everybody agrees with me."

I move that that part be stricken out.

It is the Doctor's personal opinion. He differs with it, but I doubt if he can talk for everybody.

The Court: All right. I will let it stand.

Philip M. Stimson—Direct.

Q. Doctor, are you familiar with, or do you know Dr. Samuel Frant? A. Yes, I know Dr. Samuel Frant.

Q. Do you know of his reputation as a polio expert? A. Dr. Frant is a very capable administrator and epidemiologist. To the best of my knowledge he has not written any articles on polio, nor has he done any original work on polio epidemiology.

I was distressed to read in his testimony that he did not consider Dr. Ward to be an expert —

Mr. Rassner: I object to that and move that it be stricken out.

The Witness: It is in the testimony.

Mr. Rassner: It is not responsive.

The Court: He says he was distressed when he read it. What difference does it make?

The Witness: I read it in the testimony.

Mr. Rassner: I object to his comments, and I ask that he stop these comments.

The Court: There is no jury here, Mr. Rassner.

Mr. Rassner: Yes, but I object to those comments.

The Court: And there is no —

Mr. Rassner: All right, I am resuming my seat.

The Witness: I might say that there is to be a meeting in Boston in April, of the American Academy of Pediatrics, and in that meeting there is to be a panel discussion of the newest knowledge on poliomyelitis, and the very astute committee on the program has chosen, to discuss the epidemiology of polio, Dr. Robert Ward.

The Court: All right.

The Witness: To discuss the epidemiology of polio.

The Court: All right.

The Witness: I have the program here, if you would like to see it.

Philip M. Stimson—Direct.

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Q. Now, Doctor, I handed you a certified copy of the clinical record of Mr. McAllister on the U. S. S. Repose. That is No. —

The Witness: Exhibit E it says on this.

Mr. Rassner: That is B, Mr. Gray.

Mr. Gray: Respondent's Exhibit E.

Mr. Rassner: He has B, he says.

The Witness: No. Exhibit E, I said. It says Exhibit E in evidence.

Q. Will you please examine that report. A. I have done so. 698

Q. And state whether in your opinion the Sister Kenny method — state when in your opinion the Sister Kenny method should have been commenced, if at all, based upon that clinical record. A. According to this record, I read that on December 11, 1945 — it states diagnosis changed to poliomyelitis anterior.

Previous to that it says he was admitted to the hospital on the 7th with a diagnosis of medical observation, but I must say that the description of the patient on the admission note — I wonder that they did not diagnose it before that, because it is rather suggestive in their admitting note that it was polio, but it was six days later, before they put it on the record. The diagnosis was changed to poliomyelitis. 699

And the Sister Kenny treatment is of course applicable to any patient who has pains. That is, the hot packs are applicable to anybody who has pain in his muscles.

As I said awhile ago, if this patient had pains in his muscles when he was admitted in the hospital, for symptomatic relief they might have put some hot packs on him, or put him in a hot tub, whether or not he was diagnosed as poliomyelitis, but so far as the Kenny treatment of poliomyelitis is concerned, I don't see how they can apply the treatment to poliomyelitis before they diagnosed it as being poliomyelitis.

Philip M. Stimson—Direct.

The Court: Do I understand, Doctor — I will of course carefully consider all the medical testimony — but the sum and substance of what you are telling us is that if the virus has entered the nerve system, and was gradually building up, there wasn't any treatment to apply that would stop it from progressing?

The Witness: That is perfectly true. To the best of our knowledge now, six years, seven years, after this patient was sick.

The Court: You mean he had it?

The Witness: He had it then.

The Court: You might have relieved things, and all that kind of thing, but he would have this nervous system attack?

The Witness: Yes.

The Court: And it might be paralysis —

The Witness: And it might not.

The Court: And it might not?

The Witness: Yes. Very definitely. And we can't do anything about it.

The Court: And if he had enough neurons as you call them —

The Witness: To function.

The Court: to function —

The Witness: Yes.

The Court: He would be all right.

The Witness: And I think that one of the tragedies of that first trial was this lad was given the impression, which impression was given by Sister Kenny, and others did it too, that if he had had better treatment he would not have been so badly paralyzed.

The Court: Then that is the situation — they can relieve things, and all that kind of business, but if he once had this virus —

The Witness: That is that.

The Court: That is that?

The Witness: Correct.

By Mr. Gray:

Q. You have read the testimony of Dr. Frant, have you, Doctor? A. Yes.

Q. And did you observe the expert opinion which he gave to the effect that in his opinion the permitting of Chinese coolies and others aboard the *Edward B. Haines*, while the vessel was at Shanghai, was the competent producing cause of Mr. McAllister's disease of polio? A. I read that.

Q. On the basis of the record and of the qualifications which Dr. Frant set forth there, in your opinion was Dr. Frant competent to make such, or, to form such an opinion, and express it in Court? A. Well, I don't like to judge on his competence, but—

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Mr. Rassner: I still don't think that the question was proper, and I object to it. Especially what the doctor—

The Court: Eliminate that part, Doctor.

Do you know what the question is?

The Witness: Yes.

The Court: Just eliminate that part.

The Witness: Yes.

705

May I comment?

The Court: Yes.

The Witness: I think that if Dr. Frant had said that it is a possible cause rather than the cause, he would have been more within his—he would have been more accurate, but the virus, as we know now, and I think Dr. Ward, when he testifies, can discuss it with greater authority than I, or anybody else—

This man might also have been exposed to it when he was ashore, or he might have been exposed to a member of the crew who had been ashore and had been exposed to a carrier. Probably he was exposed to some carrier somewhere.

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Philip M. Stimson—Direct.

We now know that during an epidemic there are so many carriers that it is impossible to trace who is the cause of any particular case.

Here in New York, at the time of an epidemic of a few cases they can probably invariably pick up the virus in the sewage in the East River, passed down from the hospitals and the houses in that area. The virus is omnipresent and we cannot keep away from it.

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The Court: Could it come from the use of the same eating utensils?

The Witness: No. It is direct with a person usually. The secretions of the nose and throat.

The Court: It isn't just in the air?

The Witness: No. It is direct contact.

The Court: Direct contact?

The Witness: Yes, sir.

The Court: Now, if somebody used a coffee cup that wasn't clean, and the next one who came along used it, he might get the bug, might he not?

The Witness: Oh, the virus dies out very quickly when dry.

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The Court: He might get it?

The Witness: It is a very remote possibility.

The Court: All right, now, could he get it through urine?

The Witness: No. It has never been found in the urine.

The Court: Then that is eliminated?

The Witness: Yes.

The Court: You can get it from the excreta?

The Witness: Yes, from the bowel movement.

The Court: Yes.

The Witness: But there is no evidence of any person ever having been infected that way. There is no evidence of anybody having had a water infection—a sewage infection.

The Court: You are of the opinion that we don't know how they do get it?

The Witness: Probably by direct contact with a person, from the secretions from the nose and throat.

The Court: You mean sneezing?

The Witness: Sneezing, or a patient gets infected on the hand and shakes hands with someone, and from his hands it may go to the face, or from kissing.

The Court: Or from handling something? From something he had been handling?

The Witness: Very recent handling. The virus probably dies within a few minutes of drying, fortunately for us, but the present best knowledge of epidemiology I believe is that in an epidemic we can't avoid the infection. What we can do is keep ourselves in as good shape as possible, so that when we are infected it isn't going to hit us very hard, but we now know that there are 200 or 300 people infected for every one or two who develop paralysis.

The Court: All right.

By Mr. Gray:

Q. In other words, these 200 or 300 people probably get a mild form of the disease, and build up antibodies. A. They may not have any clinical symptoms at all, but they build up antibodies, so they may have a little headache, or a little sore throat, but nothing recognizable.

Q. Have you read the testimony of Dr. Di Fiore in this trial, Doctor? A. Yes, I have.

Q. And based upon the qualifications which he has set forth in his testimony in this trial, in your opinion, is he qualified to testify as an expert?

Mr. Rassner: I object to that.

The Court: Now, why do you put the doctor in the position of criticising the—

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Philip M. Stimson—Direct.

Mr. Gray: Well, it is a matter of —

The Court: He can state his own theories. He can say that his theories don't agree with those of some other doctor, but don't let's have competition as to—

Mr. Gray: If your Honor please, the competency of an expert witness is a question of fact.

713

The Court: Well, it would be endless, because they can put another doctor on, and he might not agree with Dr. Stimson, and then we can continue to go around and around, and I don't think the doctors like to do it anyhow.

Mr. Gray: But many times we have to do something in Court—

The Court: You just give me his testimony. That is the point. If it disagrees with some other doctor, why, I can see that it is not in accordance with the other doctor's theories.

714

Q. Doctor, assuming that the onset of this disease occurred on November 24, 1945, and that the patient was removed from the vessel and sent to a Marine Corps Hospital on December 1st, but in the meantime, from the time that he experienced an illness which incapacitated him from duty, until he left the ship, he received no medical attention other than complete rest, will you state whether or not that delay could be a competent producing cause of the condition of this libellant as shown in the report of Dr. McCauley, which is an exhibit in this case?

Mr. Rassner: The charge is aggravation. If you will insert the word "aggravation" I have no objection to the question.

We don't claim that the delay put the virus in this man's body.

The Court: That is right.

Mr. Rassner: Nor do we claim that what neurons

were destroyed by the virus could have been prevented by the treatment, but we do claim, and let me make this clear—apparently from the question it would seem that Mr. Gray does not understand our contention—our contention is that when this man showed signs, not particularly of polio, but of the involvement of the central nervous system, it was incumbent upon the people in charge of this man's life and health to have him removed to the care of a competent medical facility, whether it be aboard the ship, or some place else, and that the delay was a contributing factor in the end-results which the man now has. That is our claim.

716

Mr. Gray: I accept the amendment to my question as to aggravation of the libellant's conditions as to worsen his condition because of such failure.

A. That is a very hard question to answer—very difficult—because I don't know what went on during those six or seven days on the ship. I gather that he was able to get up and go to the head.

Mr. Rassner: We object to that. That is not so.

The Witness: I have seen no evidence that he was waited on.

717

Mr. Rassner: Don't make any assumptions.

May I have the Court instruct the witness not to make any of these assumptions. He can only testify as to the facts given to him.

The Court: All right.

The Witness: I just said that I have seen no evidence of it.

The Court: You mean that if there was no evidence—put it that way—

The Witness: All right, I will put it that way.

If there was no evidence—no—I will have to begin over again.

The Court: Yes.

Do you want that stricken out, and start over again?

The Witness: Yes.

The Court: Strike it out.

Start over again, Doctor.

The Witness: I said I don't know what happened during the seven days that he was on the ship.

The Court: Yes.

The Witness: That is true. I don't know.

The Court: That is right.

The Witness: I don't know whether or not he was waited on, as far as the use of a bedpan was concerned, or whether he went to the head.

I don't know whether he served any tour of duty during those seven days or not.

I don't know whether he was ordered to serve a tour of duty during those seven days or not, that he was on the ship—ordered despite his illness.

If he was allowed to rest quietly in his bunk, I can't see how it could have contributed to his present restrictions, disabilities, weaknesses.

The Court: All right.

Q. Now, Doctor, on the basis of the history of the case as shown in Respondent's Exhibit E, which you have before you, and on the basis of the symptoms which are set forth in Respondent's Exhibit D, the report of illness which I show you, will you please state whether you can express an opinion with reasonable degree of medical certainty as to whether on the basis of those symptoms the libellant's condition was aggravated in any way by his remaining on the ship at perfect rest during the period between his last tour of duty and his discharge from the ship on December 1st? A. This is a report of illness made out by the ship, apparently—on the ship.

Q. It was made out by the pharmacist's mate. A. Oh,

yes, the report was made out by the pharmacist's mate on the ship.

As far as I can see the only descriptions of the patient's illness are in Item No. 10—condition of patient on discharge from vessel, no appetite, dizziness, unable to hold food on the stomach, and weak.

Q. Now, in addition to that you will find a history of the present illness in Respondent's Exhibit E on the hospital ship Repose. A. The first stage, under PI, which means present illness, there it reads:

Onset of illness was November 24, 1945, with dizziness lasting four days followed by great weakness of forearm extremities and inability to walk, speak or swallow. Because of these complaints he was admitted to the above hospital from his ship. No definite history of headache. Findings were normal blood count and urine, spinal fluid clear, 130 cells—which is an increase.

722

And it also states that he was admitted from the 6th Marine Division Field Hospital No. 1 with a diagnosis of Medical Observation.

Q. In the light of those symptoms, and in the absence of any symptoms of fever, can you state with a reasonable degree of medical certainty whether or not the passage of time while the libellant was in his bunk could have aggravated his condition? A. I want to be entirely fair and clear on this.

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I find the facts, the medical facts, now available seven years afterwards, incomplete and confusing.

I cannot understand why a diagnosis was first made on December 11th of poliomyelitis, but apparently it was.

Apparently the diagnosis was not made while he was in the Marine Division Field Hospital, and marine doctors—well, you can strike that out.

If he did not develop enough weakness to be diagnosed as poliomyelitis clearly until the 11th of December, it is difficult to believe that on November 24th, which is two and

a half weeks earlier, he had the onset of the infection which led up to his poliomyelitis weakness.

That is a very long time for them to be able to make a diagnosis.

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This admission note to the hospital ship is very sketchy. I don't know how you can—in the first place I don't think it is very clear that the illness that led up to his weakness dated away back to the 24th. He has some weakness on November 24th. Whether that was the beginning of his poliomyelitis or not is hard to say at this time, because almost without exception if a person is going to develop the characteristic weaknesses of poliomyelitis he is going to do it within the first week, or at most within the first nine or ten days, and here it is December 11, 1945, eighteen days before they make a diagnosis, and that is four days after his admission to the hospital ship, where there are excellent doctors.

So it is hard to believe that the onset of his illness was eighteen days before they could make a diagnosis, and any opinion about what happened during that first week, and its effect on a subsequent weakness would be—I mean it seems to be pretty indefinite.

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Q. It would be highly speculative, would it not? A. Very highly speculative.

Q. Now, assuming, Doctor, that the onset of the disease occurred on the 11th of November, 1945, and was not diagnosed until the 11th of December, 1945, can you as an expert on poliomyelitis, state whether or not in your opinion the malady, or the physical condition, of the libellant, on the 11th of November, could be related to his subsequent diagnosis of polio? A. I think you can say quite definitely that the illness on November 11th that he had was in no way connected—no—was not due to the poliomyelitis infection which subsequently caused his weakness. That is 31 days. I don't see how that could have any connection—30 days, I guess it is—November has 30 days. I don't see how that could have any connection with

a paralysis which became diagnosible on the 11th of December.

The Court: Is there such a thing as being run down, as we talk about it, as laymen talk about it, and being more susceptible to this?

The Witness: Yes.

The Court: Than if he was stronger?

The Witness: Yes, there is.

We are now beginning to know what factors make a difference between an infected person developing paralysis and the 100 persons who don't.

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One of them is pregnancy, which is not involved here of course, but a pregnant woman is three to five times as likely to develop paralysis as a non-pregnant woman of the same age.

In other words, an injury to the membranes of the throat, such as a tonsilectomy.

Another factor is certain injections which seem to double the likelihood.

A fourth factor which has been developed in the last year or two is fatigue.

As I say, just before the end of the incubation period, and the first day or two of the acute illness—we have a number of illustrations, pretty conclusive, to show that if a person is physically exhausted just at the end of the incubation period and at the beginning of the fever, he is apt to have a worse case than otherwise.

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The Court: All right.

Q. Now, will you please refer to Dr. Di Fiore's testimony, in which he describes the progress of the virus in its attack upon a neuron. He said something about a cell bursting. Did you notice that? A. Yes.

Q. Will you explain to the Court just what does happen when the virus enters a cell and it develops? A. His

descriptions of the pathological changes in the cord were not those of a pathologist. The virus attacks the neuron and destroys it. It doesn't burst. It destroys some of these cells, and they are replaced by fibrous tissue which you might call scar tissue, but they never come back.

Other cells are attacked by the virus, and they are just sickened. They lose their function for awhile, and in the course of the next three or four months they regain their original condition.

731 So that there is, in patients who survive, a spontaneous return of nerve supply to muscles no matter how you treat them.

If you leave them entirely alone there is this spontaneous return of partial muscle strength. We don't know of any way of speeding it, or of any way of changing that rate of return of the neuron to normal life.

We can keep a muscle prepared so that when a nerve supply returns the muscle is better prepared for its new life, you might say, and good physiotherapy is all important at that stage, but that good physiotherapy does not necessarily begin until the 8th, 10th, 12th, or 14th day after the onset of the infection.

732 Q. What has been your experience, Doctor, with respect to the facility of diagnosis of poliomyelitis in adults? A. Most adults have a fairly characteristic course of poliomyelitis. They differ somewhat from children. They are a little more apt to have that prodromal hump toward the end of the incubation period, and I don't know whether Mr. McAllister had that preliminary hump or not. It is not diagnosable during that early stage.

Occasionally an adult or child would show a somewhat atypical course and it would be very difficult to diagnose it for a week, perhaps.

I have a patient now in the New York Hospital, an adult, a relative of two of the leading medical doctors up there. They referred this patient to me to take care of her, and I was very much complimented that they should

do so. This patient was in the hospital for five days before they were able to diagnose it as poliomyelitis, but then it became quite apparent that that is what she had. She had been seen at that time seven days, but then the diagnosis was obvious, although it is a very mild case.

Now, this is quite a marked case as far as involvement of muscles is concerned.

The Court: By this you mean McAllister?

The Witness: The McAllister case is quite a marked case as far as involvement of muscles is concerned, and I should think that they would have been able to diagnose him within three or four days of the appearance of weakness, of weak individual muscles. By weakness I don't mean general debility, but weakness of specific muscles.

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The Court: All right.

Mr. Gray: You may examine.

Cross Examination by Mr. Rassner:

Q. Doctor, you testified in the case of McAllister against the Cosmopolitan Shipping Company, Incorporated, involving the same libellant? A. Four or five years ago, you mean?

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Q. Yes. A. That is right.

Q. What is your answer? A. Yes, sir.

Q. And you have read your testimony? A. Some time ago.

Q. How long ago? A. A month ago, I think.

Q. And you have a fair recollection of your testimony? A. Yes.

Q. Is there anything that you have added today to what you said in the previous trial? If so, I would just like to have you call it to my attention, please. A. I have added to my qualifications, naturally.

Q. Yes. A. And I think I have added somewhat to the

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importance of rest since then, because we have known more in the last four years about the importance of rest.

Q. So that today you feel that rest is more important than expressed by you in the previous trial? A. Yes, sir.

Q. Anything else? A. I think perhaps we may have changed our opinion about the importance of the lumbar puncture. In those days we used to do it—

Q. Let me just enumerate those. You have put more stress on the importance of lumbar puncture on the previous trial than you do today? A. I think probably yes.

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Q. What else? A. I don't recall.

Q. So that those are substantially the only two changes? A. That I recall.

Q. Or modifications? A. Yes.

Q. Of your previous testimony, that you recall? A. That is right. I might add at this point that I had intended in this testimony, now, to concur with the accuracy and truth of everything that I said in the previous trial.

Q. It is substantially the same, is it not, Doctor? A. It is substantially the same.

Q. It is substantially the same testimony? A. I think so.

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Q. Very well. Now, do you know Dr. Devers—Dr. George Devers, of Bellevue? A. Yes, sir.

Q. What do you think of him? A. I was not allowed to say what I thought of Dr. Di Fiore—

Mr. Gray: I object to it.

Mr. Rassner: All right, let me reframe the question.

Q. What is Dr. Devers reputation in the medical profession in so far as rehabilitation of polio victims is concerned? A. All right. His reputation, and I specify this as far as rehabilitation is concerned, not including physiotherapy—

Q. That is right. A. His reputation in rehabilitation is excellent.

Q. Is he considered the leading authority on the subject, or do you know of anybody who is considered more eminent than Dr. Devers? A. Dr. Howard Rusk, who is Dr. Dever's superior.

Q. He is the clinical— A. Dr. Rusk directs the whole thing.

Q. He directs, but the actual work is done under Dr. Devers; isn't that so? A. Yes. I might add at this point that one of the others on the staff, Dr. Gurewich, recently told me, and I value Dr. Gurewich's opinion very highly, that in the Institute of Rehabilitation at Bellevue they speed the patients along much faster than he would do it, and I value Dr. Gurewich's opinion in rehabilitation work more than I do Dr. Devers'. 740

Q. So that those are the three men whom you consider to be the leading authorities in the country today? A. In New York City.

Q. How about in any other part of the country? A. Oh, there are many other excellent people.

Q. All right, then in New York City you concede that there is Dr. Rusk and Dr. George Devers— A. And Dr. Gurewich. 741

Q. And Dr. Gurewich? A. Yes, sir.

Q. And you consider them to be the leading authorities on the subject? A. Among the leading authorities on the subject. There are others. New York is such a big place, you can't just take one or two.

Q. All right, I will take your qualification. A. Yes.

Q. Now, do you testify here that there is nothing further indicated in the way of treatment on Mr. McAllister so that he can get the best possible results from the benefit of medical and surgical procedures? A. Not flat-footedly.

Q. Then you don't make that statement? A. I modify it to this extent—if I made that statement I modified it

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to this extent, that I would like to say that it is doubtful if he could have any further benefit.

Q. When did you examine Mr. McAllister, Doctor? A. I have not examined Mr. McAllister, but I have read Dr. McCauley's very detailed examination of Mr. McAllister.

Q. Well, didn't you make the statement that you base your opinion, that you doubt that further treatment would be of any benefit, by reason of the lapse of time? Wasn't that the basis of your opinion, and nothing else? A. No. That is not the entire basis of my opinion.

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Mr. Rassner: May we have a recess so that I can have the record read so as to show that that was the only thing?

The Witness: All right.

Q. Mind you, Doctor, the only thing which you stated here to Judge Inch, upon which you base your testimony that there was no—that it would be doubtful in your mind that any further treatment is indicated, is the lapse of time, and nothing else. Now, do you deny that statement?

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Mr. Gray: I think that Mr. Rassner—

Mr. Rassner: Is there an objection?

Mr. Gray: Yes, I object.

Mr. Rassner: May we have a ruling, your Honor?

Mr. Gray: It is a misstatement of the witness's testimony.

The Court: Are you talking about his previous testimony?

Mr. Rassner: I am talking about his testimony right here in court today.

The Court: You mean you want to go back—

Mr. Rassner: Yes.

May I reframe the question so that there is no doubt in the doctor's mind?

The Court: Yes.

Q. Did you or did you not testify here in court today that the basis of your opinion that no further treatment is indicated on behalf of McAllister is the delay, the lapse of time, between the onset of the disease in 1945 and now, this being January of 1953? Isn't that your testimony?

The Court: Did you testify to that?

The Witness: I would have to have that read, but I think my memory is that that was my testimony.

Mr. Rassner: All right.

Mr. Gray: As I recollect it—

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Mr. Rassner: Now, I don't think any comment by Mr. Gray is in order. He has answered the question, and I want to put the next one.

The Court: Yes.

Q. Isn't it a fact that Dr. George Devers is treating patients who had polio, the onset of polio, as far back as fifteen and twenty years ago, and that he is still treating them? Isn't that so? A. I don't know that.

Q. Do you know how long treatment is indicated in polio cases such as Mr. McAllister's who has this condition? A. Yes, I know.

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Q. How many years do you say? A. I say as long as—there is no such arbitrary thing as a number of years. A patient should be treated as long as he can get benefit from treatment.

Q. And the sky is the limit, to quote Dr. Stimson — you — to quote you? A. All right.

Q. Isn't that so?

Mr. Gray: Now, just a minute.

The Witness: Let me handle it, please.

Q. Isn't that so, Doctor? The sky is the limit, to quote you? A. The sky is the limit, and I also said, or inferred

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Philip M. Stimson—Cross.

or implied, that in a vast majority of cases four or five years included all the benefit that the patient can get from rehabilitation.

Q. In what book did you say that? A. I say that now if I didn't say it before.

Q. You never said it before at any time. A. I say it now. I say it now.

Q. For the first time? A. Yes, sir. I don't care what it is.

Q. You have written on this subject —

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Mr. Gray: Your Honor, I object to this line of interrogation on the ground that there is no question before this court as to maintenance and cure.

Mr. Rassner: What has that to do with it?

Mr. Gray: You are talking now about maintenance and cure.

Mr. Rassner: No, I am not talking about maintenance and cure.

The Court: No; I am not considering it on any issue of maintenance and cure.

Mr. Rassner: I am not offering it on maintenance and cure.

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Mr. Gray: Then I withdraw the objection.

The Court: Yes. There is only one issue, and I stand to be corrected on this if I am wrong — there is only one issue for this Court, and that is negligence.

Mr. Gray: Yes, sir.

Q. Now, without examining the libellant, Doctor Stimson, you have testified here that it is your opinion that no further treatment is indicated on behalf of McAllister. Is that right? Yes or no? Is that right? A. I think that is, yes, yes.

Q. Now, let me read some of your testimony to you, Doctor, and ask you if you want to change it or modify it.

The Court: This is in the record of the other trial?

Mr. Rassner: This is in the record of the previous trial, your Honor.

A. All right.

Q. Now, I think in the interest of saving time, that you should stop me when you feel that you don't agree with your comments or when you feel that you have not so testified. A. All right.

Mr. Rassner: I am starting on page —

752

The Court: You are not going to read all the testimony?

Mr. Rassner: Oh, no.

The Court: Very well.

Mr. Rassner: I just want to call your Honor's attention to the fact that Mr. Gray took until five minutes after twelve, and I am going to take about twenty minutes, if I may.

The Court: All right, we have a doctor here, and maybe we can get through with his testimony today.

Mr. Rassner: I say that so that the doctor can guide himself on his future appointments. I am going to take about twenty minutes, if you will help me, Doctor —

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The Witness: Surely.

Mr. Rassner: By giving me your direct attention.

The Witness: Surely.

Mr. Rassner: And just stop me if you don't agree with anything I read, Doctor, or if I am misreading something.

The Witness: No, you are not going to misread. You can read.

Mr. Rassner: I am starting at page 396, at the top of the page, this being part of your answer:

(Reading) "A third factor is exhaustion due to

fatigue, and chilling. There is a good deal of clinical evidence that the patient who has come down with the first manifestations of the disease, or who is just incubating the disease, if he gets thoroughly exhausted, is apt to have a worse case of the disease than if he went to bed promptly.

“There is a good deal of clinical evidence as to that, so that we feel that rest in the early stages of the disease is quite important. If this patient had gone to bed on the first day of his illness, who knows whether he would have been as sick as he is now?

“I think personally that that is more important than whether or not he had hot packs put on him. If he had been—I am down here to testify what I think about this thing, and no matter which side it falls, I told the counsel I was going to testify as I saw it on this. If this man had been sick and had said he was sick and had been ordered to work when he was sick, it might conceivably have aggravated his polio.”

Q. Did you so testify? A. Yes, that is practically what I said now.

Q. So that polio, according to your testimony, can be aggravated; isn't that so? A. Yes, sir, that is right.

Q. Regardless of the methods? A. This is a repetition of what I said a few minutes ago.

Q. I am sure you will bear with me, Doctor. I am not a doctor and my memory may fail me. A. Yes, sir, surely.

Q. And I may have to ask you something which I have overlooked. A. All right.

Q. So you make the direct admission that polio can be aggravated; isn't that so, Doctor? A. That is not an admission. That is a statement.

Q. Then you make the direct statement that polio can be aggravated? A. Yes; several times.

Q. That answers my question.

Now, continuing to read from Folio 1188—the last paragraph:

(Reading) "Now, this gentleman—you are speaking of McAllister—"I understand has been sick two years. That is comparatively early in the stage of treatment. He may not get back any more—he will not get back any more nerve supply to his muscles, but what muscle strength he has can be increased by exercise, even as a person with a normal muscle can go to a gymnasium and exercise it and perhaps double its strength. So a person with a fifth of a muscle can go to a gymnasium and exercise and double that fifth, perhaps to two-fifths. If it is only a tenth of a muscle and he exercises and doubles it, he has two-tenths, which is better than one-tenth.

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"So one thing he can do is exercise, exercise, and try to increase the strength of what he has left.

"A second thing that can be done for him is, there are orthopedic operations which will make life often, in many cases, much more—well, increase one's horizon is the usual term we use—expand your horizon."

759

Now, I ask you now, Doctor, did you testify that operations could help Mr. McAllister?

A. Yes, sir—wait a minute—

Q. He hasn't had any operations— A. I didn't say they could. I said they might.

Q. Well, I don't think you said "might." You said they will. Let me read it now to you. A. Well, I meant "might," because I didn't—

Q. Did you so testify, Doctor, or didn't you—"a second thing that can be done for him is, there are orthopedic operations which will make life often, in many cases, much more—well, increase one's horizon is the usual term we use—expand your horizon."

Mr. Gray: But not in this case.

Mr. Rassner (Reading): "A second thing that can be done for him"—

Mr. Gray: Not in this case.

Mr. Rassner: Wait a minute. Let the doctor say what that means.

The Witness: If I said that—

Q. Did you say that, Doctor, or didn't you? A. If I said that, I did it without having examined the patient. I had not examined the patient.

Q. You haven't examined the patient now either, have you? A. No, but now I have read Dr. McCauley's detailed examination, which would be better than any examination I could do.

Q. And therefore you want to change your previous testimony about operations being beneficial for him—for McAllister?

Mr. Gray: That is objected to. I don't think that is the prior testimony.

The Witness: I didn't say it was in his case—

Mr. Rassner: Wait a minute. Did I read that incorrectly? If I didn't, I want to apologize.

The Witness: Well, Mr. Rassner—

Mr. Rassner: Will you let me do my part? Let me read this again.

(Reading) "A second thing that can be done for him is, there are orthopedic operations which will make life often, in many cases, much more—well, increase one's horizon is the usual term we use—expand your horizon."

And you used the pronoun "him."

The Witness: I said, "in many cases," also.

Mr. Rassner: That is right.

The Witness: All right.

Mr. Rassner: Do you mean that when you said

"A second thing that can be done for him is", that you did not mean that in this case it applied?

The Witness: Apparently I must have said that, but I said, "in many cases," also—in general.

Q. Well, now, what did you mean when you told us the following:

(Reading) "A second thing that can be done for him is," and then you speak of operations? Did you mean to testify that in your opinion operations could be beneficial to Mr. McAllister, or were you talking about other people?

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A. Oh, I must have had in mind that it might be beneficial to him, but I had to examine him, and I had no right to say that they could be, if I did say that.

Q. At that time you were referring to Mr. McAllister, were you not? A. Apparently that is what it says.

The Court: That was five years ago.

The Witness: That was five years ago, your Honor.

The Court: And now you are making advances and everything else.

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The Witness: Yes, but the advances don't count, I am afraid, at this time, your Honor. At that time he was two years from his onset, and most polio patients two years from their onset, who are markedly restricted, can be helped by some kind of reconstruction operation two years afterward. This is, now, seven years afterwards. The man, according to the description of Dr. McCauley, is making pretty much the most of what he has.

The Court: Very well.

The Witness: He is very capable, and reading the present description of Dr. McCauley, and know-

ing that in general very few, if any, polio cases can be benefited seven years from the onset, I made the statement a while ago that I did not think that any further rehabilitation was indicated for this particular patient.

The Court: All right.

The Witness: Now, you can quibble on that backward and forward.

Mr. Rassner: No; I merely want to point out whether or not you are changing your testimony now from the testimony you gave at the previous trial, and this is for no other purpose. Irrespective of whether you were right then or now, are you changing your testimony?

The Witness: I don't see how that is a change. It is seven years now. It was two years then.

Q. Do you say that after two years treatment is not indicated in a polio case? A. No, I don't say that.

Q. Do you still concede that the sky is the limit, and that you can determine that only by trial and error? A. Yes, sir.

768 Q. And Mr. McAllister hasn't been tried out yet by anybody, has he? A. Oh, I differ with that.

Q. Has he been— A. What do you mean by tried out?

Q. Has he been given orthopedic exercise under supervision, and under medical direction, that you know of? A. As far as I know he has had excellent supervision—no—just let me—

Mr. Gray: I object to that.

Mr. Rassner: Will you answer my question instead of making speeches, Doctor? Do you know—

Mr. Gray: I object to that, your Honor.

Mr. Rassner: May I have a direct answer, instead of telling me something that I am not concerned about?

The Court: Why not have the doctor answer the question?

Mr. Rassner: May I have a direct answer to my question, instead of debating and evading—

The Court: Certainly. Go ahead.

Mr. Rassner: Please answer my questions, and don't tell me about anything else.

The Witness: All right. What was your question again?

Mr. Gray: I object to the question.

The Court: Let him ask the question now—

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Q. Do you know whether or not Mr. McAllister has had any rehabilitation treatment under any medical authority? Yes or no? A. It is my impression—

Q. Do you know? A. I won't answer that yes or no any more than I will answer yes or no to the question, have I stopped beating my wife, but it is my impression that he has had—that he has been taken care of in government hospitals, veterans hospitals, for a period of a number of years.

Q. How many years? A. I don't know.

Q. Where did you get that impression? A. I don't know where I got that impression, but—

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Q. Can you point out anything that would be the basis of such an impression?

The Court: Well, didn't he testify here on the stand—

Mr. Rassner: But the doctor doesn't know that. That is the point that I am making. The doctor doesn't know that.

The Witness: Yes, I do know it.

Mr. Rassner: And he happens to be all wrong, because Mr. McAllister did not get a series of rehabilitation treatments, and he is dead wrong.

The Witness: What do you mean by a series of rehabilitation treatments?

Mr. Rassner: Can you point out—

The Witness: How long was he in the government hospitals?

Mr. Rassner: May I ask the questions, Doctor?

The Witness: Yes, you may ask the questions.

Q. Can you point to any record or any document or any report upon which you can base your opinion that Mr. McAllister got rehabilitation treatment? A. It is my impression that in the transactions, or in the report of the first trial, two years after, or three years, after—that it does give some statement to the effect that he had hospital care.

Q. Can you point out anything— A. I haven't got the record here—I haven't got the book here—and it would take a long time to do that.

Q. So you are relying on an impression. A. I am relying on an impression, yes.

Q. Didn't you testify—

Mr. Gray: I would like to ask Mr. Rassner, isn't it true that Dr. Devers is referred to in this prior record as having given rehabilitation treatment to this libellant?

Mr. Rassner: I object to that, your Honor. I don't think that Mr. Gray is authorized to ask me any questions. I am cross-examining this witness on credibility—

The Court: Didn't Mr. McAllister say, when he was on the stand, that he went to a rehabilitation center?

Mr. Gray: To Bellevue.

Mr. Rassner: Oh, yes, he went there, but there was no attempt made to institute—

The Court: And that he was hoping to get a chance to become an accountant?

Mr. Rassner: That is right, he was hoping to get treatment that would make him physically capable in the future—

The Cou. That is right.

Mr. Rassner: Sometime in the future.

The Court: That is right.

Mr. Rassner: But he was by no means talking of the method of rehabilitation which this doctor assumes he has had and has concluded that he has had. He has had some of it on a few occasions, but they are far from having been concluded, and he has never been discharged as having concluded that treatment.

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The Court: I don't know that we need spend much time on that.

Mr. Rassner: These are assumptions, I want the Court to understand, these various assumptions, made by Dr. Stimson, which are not supported by anything that he knows about them.

The Court: What about it?

Mr. Rassner: Well, it is on the question of credibility in connection with his differing with doctors whom I have called on behalf of the libellant, and I want your Honor to know that he is not entitled to very much credibility—

777

The Witness: Just a minute. May I have a chance to read the record? I want to show you where he did say that Dr. Devers—

Mr. Rassner: May I continue?

Mr. Gray: I have the record here, your Honor, where he told—

Mr. Rassner: May I continue with my questioning?

The Witness: May I answer the question that he is asking?

Mr. Rassner: You have answered that question, Doctor.

The Court: All right.

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Philip M. Stimson—Cross.

(At this point Mr. Gray handed the record to the witness.)

Mr. Rassner: If your Honor please, this procedure is highly improper—for Mr. Gray to hand up records to the doctor while I am examining him.

The Court: Wait a minute, now—

Mr. Gray: Mr. Rassner asked the doctor to point out where he had seen it, and I am showing the doctor where he did—

The Court: Let him look at it.

779

Mr. Rassner: The question is withdrawn. May I ask another question?

The Court: This was a question on rehabilitation, wasn't it?

Mr. Gray: Yes.

Mr. Rassner: I withdraw the question. May I continue?

The Court: Yes.

The Witness: No—you asked me—

Mr. Rassner: Do you mind if I get a ruling from the Court

The Court: You can answer that.

780

The Witness: Yes. He asked me where I get my impression that this—

Mr. Rassner: I asked what records you had—

The Witness: I am about to name the record. It is pages 263, 264 and 265 of the record of the previous trial.

Mr. Rassner: Very well. Then we know upon what you base your impression.

The Witness: It says specifically, on page 265—

Mr. Rassner: I object to any further statements—

The Witness: (Continuing) "I was getting rehabilitation treatment. I was an outpatient at that time."

Mr. Rassner: May I have a ruling, your Honor?

The Court: Just a minute.

Mr. Rassner: I object to the doctor making any further statements—

The Court: Just a minute. There is no need to get excited. You asked the doctor a question, and you say this affects his credibility. I will let him answer the question.

The Witness: Yes.

The Court: He is talking about page 265.

There were so many of you talking at the same time—

(Discussion off the record.)

The Court: All right, Doctor.

782

The Witness: It says in this record, specifically, "Q. What type of treatment are you getting at the Hospital for Ruptured and Crippled—or vice versa?" And the answer is, "A. I was getting rehabilitation treatment. I was an out-patient at that time."

The Court: And that is what you base your statement on?

The Witness: Yes—that he had had rehabilitation treatment.

Mr. Rassner: All right, that answers my question.

The Court: All right, now you may take your book back, Mr. Gray.

783

Mr. Gray: Yes.

The Witness: Thank you. I knew that I had seen that somewhere.

Mr. Rassner: Continuing with the paragraph on page 397, and so that we have it in chronological order I will repeat the previous part of your answer that I have already read:

(Reading) "A second thing that can be done for him, is, there are orthopedic operations which will make life often, in many cases, much more—well, increase one's horizon is the usual term we use—expand your horizon; and, finally, people can be taught to

substitute, to use a good muscle to take the place of one that is bad, and to carry on."

Do you still agree with the last part of that— that people can be taught to use, to substitute, one muscle for another?

The Witness: Yes.

Q. Is that included in rehabilitation? A. Yes.

Q. And do you know of anything other than what I have just read upon which you base your impression that Mr. McAllister has been taught to use muscles by substituting one for another? A. Answering your question specifically, I don't know that he has been taught to use rehabilitation.

Mr. Rassner: I will continue with the reading.

(Reading) "This is called rehabilitation, and there are herein New York City three excellent places where one can get rehabilitation: Dr. Rusk's work at Bellevue is good; the Institute for Crippled and Disabled at 23rd Street and First Avenue is good, and if he is a citizen of New York State, the New York State Reconstruction Hospital at Haverstraw is probably the best. It is excellent, where they teach them to make the most of what you have got in the treatment of poliomyelitis after the first acute stage. The whole motto of the place is 'Teach the person to make the most of what you have got.'

We all of us are restricted somewhat. I have to wear glasses when I read. I was born too soon and I can't play singles in tennis any more. I am restricted. Some of our restrictions are more obvious than other people's restrictions, but everybody has some restriction.

The poliomyelitis patient's restrictions are rather more obvious than others, but that is no reason why he should be limited by them. The sky is the limit as to what a polio patient may do if he goes at it."

Q. Did you so testify? A. Sure, and I am rather proud of that.

Q. And is that correct? A. Yes.

Mr. Rassner: I will read further. This is on page 401, starting at the bottom of the page:

(Reading)

"Q. Now I should like to read to you the question and answer in the testimony of Dr. Di Fiore on page 18, at the bottom of page 18:

'Now, assuming that Mr. McAllister had these symptoms' and they are the symptoms which you have described — 'on the 24th of November, and was left to lay in his bunk until the first of December, can you state with a reasonable degree of medical certainty as to what effect such lying in bed would have upon the end result? A. Well,—

788

'Q. With a reasonable degree of medical certainty. A. In my opinion—

'Q. Yes. A. The end result is here seen.

'The Court: The end result is what?

'The Witness: Is here seen in this case. In other words, the end result of lying in bed for a period of time with no treatment. That is my opinion.'

789

"Q. Do you agree with that Doctor? A. No, no at all.

"Q. And will you please state why you do not agree with it? A. Because the disease is an extremely variable disease and there is no predicting what is going to happen in a particular case and I cannot see how lying in bed for six days is going to affect the health of the nerve cells in the spinal cord."

Q. Did you so testify? A. I believe so.

Q. And did you testify that the disease is an extremely variable disease and that therefore you do not know what effect the failure to treat, or lying in bed for six days, had?

A. Will you read that part again, please? Rather than trusting to memory, will you read it, please?

Q. (Reading) "Because the disease is an extremely variable disease and there is no predicting what is going to happen in a particular case and I cannot see how lying in bed for six days is going to affect the health of the nerve cells in the spinal cord." A. Yes.

Q. And you were restricting your answer to the condition of the nerves in the spinal cord? You had reference to the anterior horn cells; is that right? A. Apparently, yes.

791

Q. That is what you meant to convey? A. Yes.

Q. That you did not know how those nerves, those nerve cells, would be affected?

Mr. Gray: He did say --

A. I did know how they would not be affected.

Q. How about the sick nerves? Would they necessarily die? A. No.

Q. They could be rehabilitated, could they not? A. They could recover regardless of what we do.

792

Q. So that it was your intention to convey the thought that the dead cells—that nothing could be done for that—and that the sick cells could recover. A. Could recover, yes.

Q. Could recover. A. Regardless of what we do.

Mr. Rassner: Now, continuing to read, starting at Folio 1209:

(Reading)

"Q. Then is it correct to say that the treatment Mr. McAllister got for the period that he was in bed prior to December 1, is the treatment he would have gotten if a doctor had been called, complete rest?

"Mr. Rassner: I object to the form of the question. 'Complete rest' he got lying in the bunk without a physician and the attendance of a nurse, and the rest that he would get in a hospital is entirely different. I object to the form of the question.

"The Witness: Sure it is different.

"Mr. Gray: But—

"The Witness: Let me answer in that form because I follow what you have in mind.

"Mr. Rassner: Yes, Doctor, of course.

"The Witness: Surely. No, I don't think he had the same treatment in his bunk that he would have had if he had been in a hospital, that is obvious. The difference is, I do not know—it would depend a good deal upon the alertness of the doctor in whose hands he got in the hospital."

794

Did you so testify?

The Witness: If it is as you read it, I did.

Q. And it is still your opinion that he would have gotten different treatment in a hospital than he got while lying in his bunk? A. No.

795

Q. Well, let me read this testimony to you, and see if you want to change your testimony. A. All right, then I did want to change it.

Q. (Reading) "Q. Then is it correct to say that the treatment Mr. McAllister got for the period that he was in bed prior to December 1, is the treatment he would have gotten if a doctor had been called, complete rest" and you said, "No, I don't think he had the same treatment in his bunk that he would have had if he had been in a hospital" A. I have to change that now, because I now know what I did not know then, that he was not diagnosed as polio until the 11th of December, and if a doctor had seen him the first six days, in addition to seeing him all the time

he was in the Marine Hospital, I don't see how he would have changed his treatment.

Q. Is it your testimony that if a man or a child has polio it doesn't make any difference whether you take him to the hospital, or whether you leave him lying at home, unattended by a doctor? A. I leave them at home, nowadays—not unattended by a doctor.

Q. I asked you, "unattended by a doctor." A. That is hard to answer specifically yes or no.

Q. All right. A. Because what the doctor is going to do is to tell the mother to leave him alone.

Q. Then you say that it doesn't make much difference whether a polio victim has a doctor or not in the early stages? A. No, I don't say that.

Q. Do you consider it good practice for a patient having some involvement of the central nervous system, diagnosis undetermined, to be left alone without the aid of a doctor?

Mr. Gray: That is objected to as immaterial and irrelevant unless it appears that the knowledge—

The Court: I will allow it.

Mr. Gray: —that there was knowledge of the involvement of the central nervous system.

The Court: I will allow it.

Go ahead.

A. I think it is dangerous for a patient who has an involvement of the central nervous system to be left unattended.

I don't know what you mean by "unattended by a doctor," but I have no evidence that this patient, while he was in the hospital, had an involvement of the central nervous system—I mean while he was on the ship.

Mr. Rassner: Let me to continue to read this. Maybe we can clarify that.

(Reading) This is Folio 1218—

"The Court: How does this germ that you have spoken about get into the throat or nose? Is it floating in the air or does it have to require some physical contact somewhere?"

"The Witness: I am not an authority on that. Dr. Ward, who is to speak later, I think is one of the country's leading authorities on that subject, and I would like to refer that to him, except that we do know that polio has many similarities to measles, chickenpox, the mumps, and German measles. It acts just like them in many ways, and it is epidemiology, except it is more of a summer disease than it is a winter disease.

800

"My understanding is that the direct contact with a patient or a healthy carrier is far and away the commonest means of infection. Now, what constitutes direct contact is hard to express.

"In measles it means that there can be an intermediary. A mother going from one child to another can carry the virus somewhere in a dress or her hands or her hair or her face.

"We know that the virus of poliomyelitis is found in the saliva, the secretions of the nose and throat for the first few days of the disease and before the onset of the disease, so that probably it is more apt to be that source of infection than through bowel movement."

801

The Court: Haven't we had all this?

The Witness: Yes.

The Court: We had that this morning.

Mr. Gray: It is just repetitious.

The Court: He answered my question on that this morning.

Mr. Rassner: That is right.

I wanted to preface my next reading with this previous reading.

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802

(Reading)

“The Court: Through the what?”

“The Witness: The bowel movement, the stool or feces.

“Mr. Gray: You may examine, Mr. Rassner.

“The Court: What have you got to say about the testimony to the effect that there was erected on the deck of the ship a toilet or a latrine or whatever you want to call it, and that for a period of time while the ship was at Shanghai that that toilet was being used, and the water was apparently dropped into the sea, or something leading up the base?”

803

“The Witness: Dr. Ward can talk more authoritatively on that than I can.”

Q. Was that your testimony? A. Yes, I think so.

Q. Do you feel that you are more qualified to give an opinion now than you were at that time? A. I felt that I was qualified then, but I deferred to Dr. Ward.

Q. And do you feel that you are now qualified better to give an opinion than you were at the previous trial? A. Yes, I would say that.

804

Mr. Rassner: All right, that answers my question. I will continue with the reading.

This is cross-examination now, Doctor.

The Witness: Yes.

Mr. Rassner: This is when I started to ask you these questions.

The Witness: Yes.

Mr. Rassner: (Reading)

“Q. Dr. Stimson, I was wondering if we might go a little further with instruction on this subject. I have here a little pamphlet put out by Marion O. Lerrigo, for the National Foundation for Infantile Paralysis—I assume

you have seen it? A. May I see it for a minute? I don't recognize it by that name.

(Mr. Rassner hands to witness.)

A. Polio and people — yes.

"Q. It says here — and do you agree with it — that 'the first major epidemic of polio, as infantile paralysis or poliomyelitis, is called, occurred in 1916, when 27,363 cases were reported. In the past 30 years, 223,306 additional persons came down with the disease.' Do you agree with that? A. Yes.

806

"Q. All right, that is enough. A. May I add a statement to that epidemic of 1916?

"Q. Go ahead, Dr. Stimson, but I was thinking of getting you out of here by one o'clock, but I am not going to stop you."

And that applies now too, Doctor.

(Continuing to read)

"A. Well, this is very short. That epidemic was at a time when people did not recognize in that poliomyelitis without paralysis and practically all those 27,000 cases were paralytic cases; therefore the mortality was far higher than in more recent epidemics when we have had many cases of the acute poliomyelitis without paralysis.

807

"Q. What I mean to bring out by that question is this, that during the last 30 years with so many hundreds of thousands of cases, the disease has become generally known, hasn't it? A. By name, certainly.

"Q. And unfortunately by experience, isn't that so? A. Yes."

Now I will continue from Folio 1232.

(Reading)

"Q. Well, that is only by artificial means. A. No."

This is on the subject of contagion.

Mr. Gray: Is this at Folio 1282?

Mr. Rassner: No; Folio 1232.

I will begin a little ahead of that.
(Reading)

"Q. However, we do know this, that the disease is one that attacks mankind and does not attack animal life? A. Except in monkeys.

"Q. Well, that is only by artificial means? A. No, sir.

"Q. In any event, mankind is afflicted by the disease of polio, isn't that so? A. True.

"Q. And it is spread from man to man, isn't that so? A. Yes.

"Q. And of course the less contact the less the proportionate danger of infection, isn't that so? Well, that is common sense. A. That is a theory. One person carrying disease is plenty infectious."

Mr. Rassner: Did you so testify, Doctor?

The Witness: Yes.

Mr. Rassner: (Continuing the reading):

"Q. Oh, yes, of course as a practical proposition, but as a general common sense proposition I think you have advocated in your book that you should not mingle unnecessarily in crowds, you should watch sanitary conditions, and so on, and take as many precautions as possible; haven't you advocated that yourself? A. Oh, yes.

"Q. And the reason for your advocating that is, of course, the less number of people you come in contact with the less the danger of exposure, isn't that so? A. Yes, that is obvious.

"Q. All right. Now, isn't it a fact that it is a comparatively easy problem for the medical profession to detect poliomyelitis today? A. In certain cases, yes; in certain cases, no.

"Q. Now, what cases would you say yes, that it is comparatively easy? A. Those where there is obvious weakness of a muscle or muscles." Did you so testify, Doctor.

The Witness: Yes.

Mr. Rassner: (Continuing the reading):

"Q. By that you mean if a man is lying in bed and he cannot move his arms and legs very easily? A. Well, he says he cannot lift his arm or his leg from the bed and if he has had a headache and a stiff neck and a stiff back.

"Q. And can't take food, swallow food? A. Well, that is in the comparatively unusual case where they cannot take food.

"Q. But it is an added— A. It is added.

"Q. It is an added danger sign? A. Yes, but nothing specific or diagnostic.

812

"Q. Now, that type of picture is comparatively easy for the doctor to recognize? A. Not for the average doctor. A person has to be alert to the possibility of polio, to think of many of the mild cases of polio—

"Q. Well, let us put it this way— A. —it is not an easy diagnosis very often.

"Q. But I am not talking about very often. I am talking about a case that you say is easy to recognize by the average doctor—give me that case, one that is easy to recognize by the average doctor. What symptoms would he need? A. All right. Sudden onset of an acute illness, with fever and headache and stiffness, some stiffness of the neck and back and other muscles, and complaining of being uncomfortable and showing some weakness in one or more muscles." Did you so testify, Doctor?

813

The Witness: Yes.

Mr. Rassner: (Continuing to read):

"Q. How about if you added to that difficulty in swallowing, paralysis of the jaw, that is, inability to move the jaw, and a feeling of apprehension? A. That would be a dead ringer for tetanus or rabies.

"Q. What would? A. Inability to move the jaw and a feeling of apprehension.

"Q. Well, isn't a feeling of apprehension one particularly found in infantile cases? A. And rabies and tetanus—any acute infection of the nervous system.

"Q. Well, that is one. A. It is one of the group.

"Q. That is what I mean. So when you add that one to the other signs, that is an added stage or sign, isn't it? A. What do you mean by that, a danger sign?

Q. Well, it is an added sign of polio? A. That you were dealing with an acute infection of the central nervous system, not necessarily polio." Did you so testify, Doctor?

815 The Witness: If you have read that correctly, I did.

By Mr. Rassner:

Q. So the symptoms and signs which you have described were clearly evidence of the involvement of the central nervous system; isn't that so? A. Those that you described there?

Q. Yes. Isn't that so? A. Yes, sir.

Q. You don't desire to change that in any way, do you?

A. No; I—

816 Q. That answers my question. A. All right. Let it go at that.

Mr. Rassner: (Continuing to read):

"Q. It is certainly indicative of hospitalization, isn't it? A. Of further observation, yes; if it could be done in the home, all right; if not in the home, under care, then in the hospital.

"Q. You wouldn't say a ship's bunk is the proper type of place to treat that condition, would you? A. No, I wouldn't think so."

Q. Did you so testify, Doctor? A. Yes, sir.

Q. And is that your opinion still? A. If those are the symptoms present, why, yes. I wonder whether they were present.

Q. Well, if they were present, you have no doubt that the bunk of a ship was no place to leave Mr. McAllister, have you? A. No, but this patient was later exposed to doctors for a week in the Marine Hospital, and for six days on the hospital ship, whatever its name was, and yet they could not make the diagnosis until the 11th of December.

Q. Would that alter your opinion that the bunk of a ship is no place for a man suffering from these conditions?

A. I am not sure that he had infantile paralysis.

Q. Regardless of what he has, would you say that the bunk of a ship was a proper place for him, or was a hospital— A. Well, if he had those symptoms, the bunk of a ship was not the proper place for him.

Q. And a hospital was the proper place? A. If he had those symptoms.

Q. And to leave him in the bunk was bad practice, wasn't it, Doctor? A. If he had those symptoms.

Q. That was unquestionably bad practice? A. Yes, I feel that way.

Q. Tell his Honor why that was bad practice in your opinion, Doctor. Give your reasons why that would be bad practice. A. All right. If he had all these manifestations that he has described, which I rather doubt—

Mr. Rassner: I move that the last remark be stricken out.

The Court: All right. Go ahead.

A. (Continuing)—because he wasn't diagnosed until some two weeks later—but in a bunk of a ship, if he is left entirely alone, and has good care, why, it wouldn't aggravate the disease—but what he means by bad practice he hasn't defined.

The Court: Well, he is asking you to define it.

The Witness: Yes. I am not sure just how you could say "bad practice"—

Q. You said "bad practice". A. Yes, sir.

Q. Now give the Court the reason why you said it was "bad practice."

The Court: That is right, Doctor.

A. It wasn't any practice, as a matter of fact, because there was no doctor there.

Q. You said it was bad practice? A. Well, I withdraw that statement of saying that it was bad practice.

Q. Then I have no desire to have you explain it. A. It
821 wasn't any practice.

Q. Then you want to withdraw your testimony that in your opinion it was bad practice. Is that right? Do you want to withdraw that testimony? A. Yes, because my definition of the word "practice"—

Q. You want to withdraw that statement? A. Yes.

Q. Then I have no further questions on that subject. A. My concept of "practice" is something else.

Mr. Rassner: I will continue with the reading.
This is at folio 1239.

(Reading):

822 "Q. Now let us take it this way— A. As I said before, if it is a bulbar case or a respiratory difficulty case, the early treatment is a matter of hours, and in a respiratory one it might even be minutes."

Q. Did you so testify? A. I probably did, yes, sir.

Q. Do you remember testifying that Mr. McAllister showed signs of bulbar involvement to a slight degree? A. No, I don't remember so testifying.

Q. Let me ask you if this refreshes your recollection, and if you so testified—

(Reading):

"Q. From your review of the testimony in this case, that is, you stated that you thought Mr. McAllister showed

the signs of an early bulbar case, didn't you—bulbar involvement? A. To a slight degrees, yes."

Did you so testify? A. If that is in the record, I did.

Mr. Rassner: Is that in the record, Mr. Gray?

Mr. Gray: Yes.

Mr. Rassner: It is in the record.

The Witness: All right.

Q. Did you so testify? A. Then I did.

Q. Do you want to change your testimony? A. I have no present recollection upon which facts I based that statement. 824

Q. Assuming that you so testified, do you want to change it? A. What do you mean by that?

The Court: From what you know now.

Mr. Rassner: What do you mean?

The Witness: From what I know now, I have no present evidence that he suffered from bulbar polio. This is five years later and I don't remember on what basis I made that statement.

Q. But you did make that statement? A. Evidently I did make it. 825

Q. Let me read it to you— A. On what basis—

Q. Let me read it to you, Doctor:

(Reading):

"Q. From your review of the testimony, in this case, that is, you stated that you thought Mr. McAllister showed the signs of an early bulbar case, didn't you—bulbar involvement? A. To a slight degree, yes."

Isn't that what you testified to? A. If you are reading it, yes, I did.

Q. And was it true? A. It must have been. I was testifying truly.

Mr. Rassner: Let me continue to read.

(Reading):

"Q. Well, we are not concerned with the degree; it is there. A. Well, it involves the degree somewhat."

The Witness: Surely.

Mr. Rassner: (Continuing to read):

"Q. It does. A. Yes.

"Q. Because it wasn't an acute degree, you would not say 'let us not treat him'? A. No, but the early treatment is important as a matter of life and death, and he did not die, obviously."

I will now read from folio 1240:

(Reading):

"Q. That is true, but it certainly was incumbent upon the doctor who had examined him, to institute early treatment; it was a case that indicated early treatment? A. Oh, yes."

Did you so testify?

The Witness: I don't know in what connection that is, but probably yes.

Mr. Rassner: It was in connection with the previous question.

The Witness: I presume I so testified, yes, if you are reading that correctly, but I don't know in what connection that statement came in.

Mr. Rassner: Well, let me read it back to you in chronological order.

The Witness: Well, it is—

Mr. Rassner: So that there won't be any doubt about it.

The Witness: I will grant the point.

Mr. Rassner: No; let's have it clear. You seem to have some doubt in your mind, Doctor, and I don't want to have any doubt about it in this case.

This is folio 1239:

(Reading):

"Q. Because it wasn't an acute degree, you would not say 'let us not treat him'? A. No, but the early treatment is important as a matter of life and death, and he did not die, obviously.

"Q. Therefore early treatment— A. Did not matter in his case, because he is alive.

"Q. That is true, but it certainly was incumbent upon the doctor who had examined him to institute this early treatment; it was a case that indicated early treatment? A. Oh, yes."

Did you so testify?

830

The Witness: Yes.

Mr. Rassner: Do you want to change that testimony?

The Witness: To this extent, that I have recently—

Mr. Rassner: First, Doctor, do you want to change it, sir?

The Witness: The actual wording I don't want to change.

Mr. Rassner: That answers my question.

The Witness: But I have some comments I would like to make.

831

Mr. Rassner: I don't want any comments.

The Witness: I can't—

Mr. Rassner: All I want to know is whether you want to change your testimony?

The Witness: No. I want to modify it.

Mr. Rassner: Was it true, when you were so testifying?

The Witness: Of course it was true. There are modifying circumstances now.

Mr. Rassner: I move that the latter part of that answer be stricken out.

The Court: All right.

Mr. Rassner: (Continuing to read):

"Q. That is what I mean. A. Yes.

"Q. What do you mean by early treatment? A. Emphasis on the 'early' or on the 'treatment'?

"Q. Both. A. Well, early treatment means when you have satisfied yourself as to the diagnosis and as to the need for treatment, it may be that day, or you may write the orders in the book to go into effect the next morning, as far as the illness is concerned.

"Q. Yes. In other words, when you see a case is one which shows involvement of the central nervous system, with some disease— A. Yes."

I will now continue from folio 1244, in the middle of page 415:

(Reading):

"Q. Now of course there is a definite reason for the medical profession wanting to put the patient at ease and relieve him of pain, isn't there? A. Yes.

"Q. They do not just do it arbitrarily? A. No.

"Q. Suppose you tell us the purposes of relieving pain. A. I thought I had already done that.

834 "Q. Yes, to some extent you have, but I wish you would repeat it for us and develop it for us. A. All right. Pain is one of the causes of aggravating spasm. It certainly is a cause for discomfort on the part of the patient, and in so far as we can we like to make the patient more comfortable. It is good treatment.

"Q. What do you mean by good treatment? How does it affect the patient's end result? A. I said this morning that a good treatment was cure, relief and comfort."

Q. Did you so testify, Doctor? A. Yes.

Q. And was it true? A. Yes, but—

Q. Do you want to change your testimony? A. Yes, I want to change it somewhat.

Q. How do you want to change it? A. Good treatment is used differently in the two sentences. I had in mind to use it differently in the two sentences. Good treatment in general involves three things: The cure of the patient; the relief of the pain; and the comfort of the patient; in general, for any illness that there may be. In this particular case there is no cure for poliomyelitis—there is no cure. I wish there were.

Q. How about relief and comfort? A. Relief and comfort are of importance in any illness.

Q. So that with the exception of— A. (Continuing) But there is no cure for poliomyelitis. 836

Q. So that with the exception of eliminating the word "cure" your testimony is correct, Doctor? A. I believe so.

Q. And you do not want to change it? A. That is right, but there is no cure for poliomyelitis.

Mr. Rassner: Well, I will read the following, and you tell me if you agree with this, please.

(Reading):

"Q. Yes, to some extent you have, but I wish you would repeat it for us and develop it for us. A. All right. Pain is one of the causes of aggravating spasm." 837

Q. Do you want to change that testimony? A. No. We covered that before.

Q. I am asking you if you want to change that testimony. A. No, I don't want to change that testimony. It is repetition.

Q. (Reading) "It certainly is a cause for discomfort on the part of the patient—" Do you want to change any part of that? A. No.

Q. And in your definition of good treatment you want to eliminate the word "cure" and leave the words "relief and comfort" in? Is that right? A. Cure and treatment as applied to this patient, yes.

Philip M. Stimson—Cross.

Mr. Rassner: Very well.

I will now read from Folio 1250:

(Reading)

"Q. All right. Now let us show what starvation of a patient—what effect that has on the action of the virus?
A. All right. There is some laboratory evidence on that which—you will have to take my word for it, because I haven't the article."

Then continuing on from Folio 1252:

"Q. But I think we might as well conclude that particular feature of my questioning with this comment: It certainly is good practice to have a patient adequately fed when you are trying to combat the inroads of a virus? A. Of any infection."

Q. Did you so testify? A. Yes.

Q. And is it true, Doctor, sir? A. Surely.

Q. Do you want to change your testimony in that regard? A. No.

Mr. Rassner: I will continue with Folio 1252:

(Reading)

"Q. Of any infection, isn't that so? A. Yes.

"Q. To me that is common sense. A. Oh, yes, sure."

Continuing on from Folio 1253:

(Reading)

"Q. Well, I will withdraw the question and I will just take a few articles of literature. You are familiar with this article put out by the American Orthopedic Association which I hold in my hands, are you not (indicating)? A. Is that a reprint?

"Q. The National Foundation. A. Is that a reprint from the article that came out in the Journal?

"Q. That is my impression. A. Yes, I am familiar with that.

"Q. I will ask you if you agree with this, page 20:

'Thus, through careful positioning the patient in bed with the knees relaxed in a few degrees of flexion, the feet held at 90 degrees dorsiflexion, the arms abducted slightly from the sides, and in slight external rotation at the shoulders and the back supported by a firm bed, and with the additional factors of heat and early movement of extremities most contractures and deformities can be prevented.' Do you agree with that? A. Yes, I think I do as to contractures and deformities--

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"Q. Just answer me whether you do or do not agree. A. Well, you are talking about contractures and deformities.

"Q. Now reading from page 21:

'During the early paralytic stage it is imperative that there be adequate food intake and adequate fluid elimination. The care of the bowels as well as the bladder must not be ignored. Enema may be necessary if there is marked involvement of the abdominal muscles. The patient who is being treated by means of hot packs or any other type of heat will perspire profusely. This requires restoration of fluid and of sodium chloride and Vitamin C.' Do you agree with that? A. Yes."

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Q. Was that your testimony? A. Yes.

Q. Do you want to change it, Doctor? A. Some of the emphases I might change now.

Q. Do you want to change your statement that you agree with the comments that I have read from the article of the National Foundation? A. No; I won't change that testimony.

Q. And that the intake of food is important? A. I will change that.

Q. In other words, you say now that that is not im-

portant? A. I will change it to this extent. I will say that a patient with acute polio won't eat. It is not a question of offering them food. They are not hungry and they will not eat.

You might listen while I am answering your question, Mr. Rassner.

Q. I was listening to you, Doctor. A. Most sick patients with acute polio won't eat. It is not a question of providing them with food. It is a question of their taking it. They are not hungry.

Q. But, Doctor, it is an important factor that regardless of the means used, whether it is intravenous or otherwise, that a patient be adequately fed, to prevent the inroads of the virus, isn't it? A. No, no—you are giving that unusual emphasis.

Q. Doctor, do you want to change your previous testimony in that regard in any wise? A. To that extent, yes, to decrease that emphasis.

Q. And with the exception of decreasing the emphasis, your yes is a categorical yes? Your answer is the same, in other words? That is, you still agree, but with much less emphasis? A. Yes. It is still yes, but with much less emphasis.

Q. All right, your answer is still yes, but with much less emphasis? A. Yes.

Q. Now I would like to break this down.

Let's assume that your yes is with very little emphasis.

(Reading)

“ . . . careful positioning (of) the patient in bed
with the knees relaxed in a few degrees of flexion
. . . ,”

Do you agree with that? A. No; we have changed that in recent years.

Q. You have changed that in recent years? A. Yes.

Q. How have you changed it? A. We let the patient lie in any position in which he is most comfortable in the early stages.

Q. And can you tell me whether the National Foundation of Infantile Paralysis has written articles changing their literature and modifying their statement? A. I don't know whether they have written articles to that effect or not, but I know that it is my practice and I know that it is the practice of most doctors that I know.

Q. Do you know the name of any person, any doctor, including yourself, who has ever written a statement changing this statement by the National Foundation on Paralysis? A. Yes. I can quote that to you myself.

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Q. All right, let's have it—changing this sentence? A. Yes.

Q. Let's confine it just to that, and nothing else, Doctor? A. Just a minute—

Q. The sentence is, "Thus, through careful positioning the patient in bed with the knees relaxed in a few degrees of flexion, the feet held at 90 degrees, the arms abducted slightly from the sides, and in slight external rotation and the shoulders and the back supported by a firm bed * * *"

A. Surely. An article that appeared in the Journal of the American Medical Association on June 21, 1952, by me, entitled "Home care of patients with acute poliomyelitis."

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I read: "He is allowed to lie in any position in which he is comfortable and can relax."

Q. May I see what you are reading? A. Yes. I will find it for you here (handing pamphlet to Mr. Rasaner).

Q. Let me read what you have written here:

(Reading)

"The patient's bed should have a firm mattress, but a bedboard is not usually necessary in mild cases."

Is that right? A. Yes, sir.

Q. Then in severe cases you would have a bedboard; is that right? A. Not necessarily. We usually did, but not invariably.

Q. You usually did? A. Yes, sir.

Q. Doctor, the decision as to what type of mattress and what type of bedboard is required, and as to whether or not it is a mild case or a severe one, is one that should be made by a physician. Isn't that so? A. That is obvious.

Q. Then the answer is yes? A. If you wish it, yes, sir.

Q. Not if I wish it. What is your answer. A. Yes.

Q. (Reading) "A foot-board is useful for keeping the weight of the bed clothes off the patient's legs."

Did you so write? A. Yes, sir.

Q. And the decision as to that is for a doctor, and not for a man on board a ship, a layman? A. No, I don't think that that would necessarily have to be done by a doctor.

Q. I didn't say anything about who would have to do it. I am asking you as to who would make the decision. A. That is a negligible point.

Q. But the decision is still one that should be made by a doctor? And not left to a layman? A. I don't think the decision is important one way or another.

Mr. Rassner: Very well.

Q. Did you say "A quiet environment is essential"? A. Did you read that just then?

Q. Yes. A. I must have said it then, sure.

Q. And do you agree with your own statement, Doctor? A. Yes.

Q. That a quiet environment is essential? A. Yes, sure.

Q. And would you consider the operation of winches and the loading and discharging of heavy machinery aboard a ship as coming within your description, Doctor?

Mr. Gray: That is objected to as being an improper statement of the facts, because this ship was

at sea, and there was no unloading being done while the ship was at sea.

Q. May I have an answer to my question? A. I have no evidence that that was the patient's environment.

Q. In any event, you stated that a quiet environment is essential? A. Yes, I will say that.

Q. Why is it essential? A. For the patient's peace and comfort. Not necessarily because it will affect the state of his muscles, but because it is going to make him happier and more comfortable.

Q. And the more comfortable the patient is, the better chance he has of resisting the inroads of the virus; isn't that so, Doctor? A. No. It is not going to have any effect on the virus.

Q. Doesn't the body itself act as a counteracting agent to the effects of the virus? A. That is an ambiguous statement. What do you mean by the body?

Q. The healthier the body, the better chance it has of resisting the effects of the virus? A. Unfortunately not the polio virus. It hits the most healthy people.

Q. And then the condition of the health is one which plays an important part in the extent of the inroads? A. Not greatly.

Q. Didn't you so testify? A. I testified that fatigue had something to do with it, but not otherwise.

Q. Well, did you testify in answer to this question—I am now reading from page 21—that is, I am reading from this pamphlet of the National Foundation for Infantile Paralysis—page 21:

“During the early paralytic stage it is imperative that there be adequate food intake and adequate fluid elimination.”

Mr. Gray: I object to this repetition. He has read that once already.

Mr. Rassner: All right, then I won't read it again.

Q. What about this administration of aspirin? A. Is that a question?

Q. Yes. Is that indicated in polio cases? A. It makes them a little more comfortable, but it has nothing to do with the course of the disease.

Q. Doctor, you of course agree that heat will relieve pains throughout the body. Isn't that so? A. Oh, yes.

Q. And you believe that a patient should be put in a hot tub? A. Later on, yes. You can't do it during the isolation period.

Q. Then how long would you say you mean by "later on"? A. How long after the onset of the original symptoms? A. After the fever is all gone, and he is not so tender.

Q. Can you tell us that in days? A. Oh, it is ten days, two weeks. There again it depends on whether a hot tub is available. A suitable hot tub isn't available in most hospitals.

Q. So it is your testimony that within ten days or two weeks patients should be put in hot tubs under the care of an attendant?

Mr. Gray: Ten days or two weeks after when?

Q. After the onset of the original symptoms. A. No; after the onset of fever. Not should; may be.

Q. May be? A. Yes.

Q. Under the attendance of a doctor or some other attendant? A. Yes; he may be.

Q. Now, Doctor, have you said, in your article, "When use of a tub is not practical, if the patient in bed is turned over onto his chest, hot compresses of pieces of wool blanket dipped in boiling water, then put twice through a wringer, and gently placed on the patient's neck, back, thighs, calves, and feet, and left on for ten minutes, are both soothing and relaxing to tight muscles."

Did you so state in your article? A. Yes; oh, yes.

Q. And you consider that good treatment, Doctor? A. Yes. Please specify the time of the treatment on that.

Q. You haven't specified it in your article. A. Yes, I have. It comes in in the part after care—

Mr. Rassner: Well, I will offer the article in evidence.

Any objection?

Mr. Gray: Not at all.

Mr. Rassner: That will eliminate my reading it.

(The pamphlet entitled "Home Care of Patients with Acute Poliomyelitis" by Philip M. Stimson, M. D., New York, marked Libellant's Exhibit No. 3 in evidence.) 860

Mr. Rassner: Will your Honor just bear with me two or three minutes, and I will be finished.

The Court: All right.

Q. Let me ask you if you agree with this, reading from page 18 of the National Foundation pamphlet:

"With the onset of actual paralysis the program of bed rest, sedation and protection by bed positioning is continued. Muscle examination should be made but limited to the most superficial degree in order to avoid—a footboard is of the greatest value. If correctly used it will maintain dorsiflexion of the foot and prevent shortening of the gastro— 861

"A. Gastrocnemius—that is the principal calf muscle.

"Q. Those are the muscles below the knee in the back? A. Yes, the principal calf muscle.

"Q. Do you agree with that? A. Yes, I think so, for the sake of argument."

Q. Was that your testimony? A. Yes, but I wish that you would say what time in the treatment that is.

Mr. Rassner: (Reading)

“Q. Do you agree with this, reading from page 17, referring to the early stages”—

I think that will answer your question, Doctor.

(Continuing to read)

“During this stage which may last three to five days after the onset of the disease, there may be manifestations of involvement of the sympathetic nervous system as well as of anterior horn cells. Patients with these symptoms are restless and apprehensive. Sedation by means of barbiturates and in the rare cases in which there is an appreciable amount of pain, morphine in doses suitable to the age of the patient should be given. Heat may be soothing, and unless the patient's own temperature exceeds 101 degrees, moist but not woolen packs should be applied over the spine and to each extremity in which there is beginning weakness, muscle soreness or change in muscle tone.

“And then it described how often these packs are supposed to be used. Do you agree with that?”

Then you said, “no.”

You did not agree with that article.

Do you still differ with that article?

The Witness: Yes, on certain aspects of that.

Q. Well— A. Use of sedation, for instance.

Q. Is there anything else that you differ with in that article? You differed entirely with the article at the previous trial. Do you want to modify that? A. No; some of those points—

Q. Suppose you tell me which you agree with and which you do not agree with today. That is, which, today, you agree with, and which, today, you don't agree with. I am talking of the early stages. A. Yes.

Q. And I am reading this article of the National Foundation on infantile paralysis. A. Do you know when that was dated?

Q. No. It was the last one at the time. A. At the time, yes, but that was five years ago.

Q. That doesn't matter. You tell us which parts you agree with now— A. Yes—

Q. And which parts you don't agree with now — referring to the early stage — (reading) "during this stage which may last three to five days after the onset of the disease • • •"

Do you agree that it may last three to five days? A. Yes.

Q. And that "there may be manifestations of involvement of the sympathetic nervous system as well as of anterior horn cells"? 866

Do you agree with that? A. Yes.

Q. And that "Patients with these symptoms are restless and apprehensive."

Do you agree with that? A. Yes.

Q. I think you said that you don't agree with "Sedation by means of barbiturates and in the rare cases in which there is an appreciable amount of pain, morphine in doses suitable to the age of the patient should be given." A. No.

Q. Do you agree with any part of that? A. No. No sedation.

Q. No sedation and no morphine? A. No. Because of the danger where some patients develop breathing difficulty. You can't give them artificial sleep, because difficulty in breathing may develop at night, and it would be dangerous in the case of such patients. 867

Q. (Reading) "Heat may be soothing, and unless the patient's own temperature exceeds 101 degrees, moist but not woolen packs should be applied over the spine and to each extremity in which there is beginning weakness, muscle soreness or change in muscle tone."

Do you agree with that, Doctor? A. Not entirely.

Q. With what part do you not agree? Do you agree that moist hot packs should be used? A. May be used for the relief of pain, but it does not depend on whether they

are weak or not. The weakness is not the point. The hot packs are used only for the relief of pain.

Q. Then you don't agree that they should be used for treating muscle weakness? A. No.

Q. How about using them for treating muscle soreness? A. Yes.

Q. Then you agree that they should be used to relieve muscle soreness and pain? A. Yes.

Q. How about muscle tone? A. No appreciable effect.

Q. So the only part you agree with is that relating to muscle soreness? A. Yes.

869 Q. Doctor, I am reading from Folio 1260: (Reading)

"Q. Do you agree with this, on page 19: 'With the first onset of infantile paralysis the attending physician must be constantly on the lookout for signs of bulbar involvement.' " You answered "Yes."

Do you agree with that? A. In most cases, yes.

Mr. Rassner: (Continuing from Folio 1260):
(Reading)

870 "Q. Now, is it fair to state that in the first instance where a patient shows the signs, symptoms, and makes the complaints that Mr. McAllister made when he was confined to his bed, that proper treatment demanded that he be put under the care of a physician? Isn't that common sense? A. That is a strong statement.

"Q. Of course it is, and I deliberately have made it so. Do you care to have the question read back to you? A. No. I would like to state that anybody in a sick condition obviously should have medical care where the circumstance is such that medical care can be provided.

"Q. We will come to that in a moment, but in any event that is what he should have? A. Oh, certainly.

"Q. You have answered my question. Do you see how simple it is? A. Yes."

Did you so testify? A. Yes.

Q. Do you still agree with that? A. Yes.

Mr. Rassner: Continuing, from Folio 1262:
(Reading)

"Q. Now I would like to read from your book, at page 412, the new edition which you were good enough to lend me" —

I was quoting from your own book — I assume you agree with your own book. (Continuing the reading)

"'Greater emphasis is not placed on the early combatting of muscle shortening with moist heat, usually with so-called Kenny packs'. Of course you are referring to the Sister Kenny treatment.

"'The importance of painstaking muscle re-education has been stressed.' Do you agree with that? A. Yes."

The Witness: What page is that? Does that say what page it is in my book?

Mr. Rassner: Yes. Page 412. (Continuing the reading)

"Q. 'As a result of these moves, the patients are much more comfortable from the start, and they are spared having to recover from the effects of immobilization itself.' Now would you mind explaining that to us? A. Immobilization means the application of the cast or a splint, which used to be fairly universal before Sister Kenny came over here. One of the things we are grateful to Sister Kenny for is calling attention to the harm that can be done by rigid immobilization with splints or casts. Immobilization does not mean letting a patient lie in bed."

Did you so state?

The Witness: What was that last sentence again?

Mr. Rassner: (Reading) "Immobilization does not mean letting a patient lie in bed."

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Philip M. Stimson—Cross.

Did you so testify, that you said that in your own book?

The Witness: Yes. I don't see —

Q. Do you want to change that testimony? A. I don't see anything in my book about "Immobilization does not mean letting a patient lie in bed." I don't see that at all.

Mr. Rassner: Will you agree that I have read that answer correctly, Mr. Gray?

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Mr. Gray: You have read the answer correctly as it is stated in the record.

Q. Do you want to change that, or do you say that you did not so testify? A. Well, I probably so testified, but I change that, because immobilization does not mean letting the patient lie in bed.

Mr. Gray: The record doesn't show where the quotation ended.

Mr. Rassner: I asked the witness if he so testified, and he said yes.

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The Witness: If you read it from the record, I did so testify, but immobilization—

Mr. Rassner: Wait a minute. Let's settle that right here and now. I want to prove that you said that immobilization does not mean making a patient lie in bed.

Mr. Gray: I object on the ground that it is immaterial and irrelevant.

Mr. Rassner: Let's have a ruling.

Mr. Gray has objected on the ground that it is irrelevant and immaterial.

Mr. Gray: Immobilization—

The Witness: Yes, I said that.

The Court: The witness says he said it. That is the end of that.

Philip M. Stimson—Cross.

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The Witness: What has that to do with it?

Mr. Rassner: I move that the latter part be stricken.

The Court: What is that?

Mr. Rassner: He says, what has that got to do with something or other.

The Court: All right.

How much more have you got?

Mr. Rassner: I am practically through.

If the doctor had given direct answers I would have been finished long ago.

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Mr. Gray: I object to that.

(Discussion off the record.)

The Court: All right.

Mr. Rassner: At Folio 1271, did you testify:
(Reading)

"Q. Assuming that Mr. McAllister on several occasions before the 24th of November, 1945, could not stand his watches, and when he did stand his watches he couldn't do all of his work and it had to be done by other men in his department; that after he would get through with his work, instead of mingling with his fellow shipmates he would take to his bed and remain there; that he would remain in his bed at all times other than when duty required him to be out of bed and on service; that about two or three days before the 24th of November, 1945, the 20th or 21st of November, 1945, he found that he was unable to leave his bed; he found that he had difficulty in swallowing any food, liquid or solid.

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"He found that he had difficulty in using his jaw and could not take any solid food; that occasionally he was given liquid foods; that he remained in his bunk and the condition was officially reported to the ship upon the 24th of November, 1945; that several of the shipmates, including the Chief Officer, visited him in his bunk and found that Mr. McAllister was complaining of a stiff neck, that he

was complaining of pain in the back of his neck behind his left ear; that he was apprehensive and irritable; that he had difficulty in moving any of his limbs.

"Would such a set of circumstances indicate to you that a master of a ship or an officer of a ship, having some knowledge of first aid treatment as a requirement before he could get his license, that it would be good practice for him to let the man lie in his bunk after that time, after the 24th of November, 1945, without medical observation or examination or treatment?

"I would like an answer to that. A. Well, that is some assumption.

"Q. It is hard to believe, isn't it, Doctor? A. I do not know whether to answer—

"Q. But I mean it is hard to believe; that is what you mean by your comment? A. Yes—no. I mean from assuming. There are so many details.

"Q. Let us assume it. A. It is hard to follow all the way through.

"Q. Do you want it reread, Doctor? A. No, it is too long. The answer is, I can't say yes or no because I do not know which is the correct answer to all that; but the answer is that a ship's officer would have done well to give such a patient medical attention if the medical attention were available.

"Q. Well, yes, I will accept that as an answer, but of course if the medical attention was available or not is another question. That is the second question. A. Yes.

"Q. The question is, it indicated the need for medical attention? A. Oh, yes.

"Q. No question about it. A. Oh, yes."

Now continuing with another question:

"Q. And of course after the 24th of November each day that he was left to lie in his bed in that condition was adding injury to insult, wasn't it? A. That is not a good way of putting it.

"Q. No, I have reversed the usual phrase: Insult to

injury. A. Well, it might have increased the need for a doctor, each day increased the need for a doctor.

"Q. All right. A. Provided that the manifestations were increasing.

"Q. Or the same? A. Or the same."

Did you so testify?

The Witness: Yes.

Q. And was that true? A. Yes.

Q. Was your testimony true? A. Yes. It is true—may I make a reservation on that? Assuming—

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Q. Was it true or not? Will you answer my question first? A. It is true. I testified that—

Q. Was your testimony true? A. If all those assumptions were verified, then my answer was true.

Q. Naturally. A. If all those assumptions were verified, my answer was true.

Mr. Rassner: One more question.

(Reading):

"Q. Doctor, does it become more easy to diagnose a case of polio if there is an epidemic in existence in the neighborhood? A. Very much so."

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Did you so testify?

The Witness: Sure.

Mr. Rassner: Is it true?

The Witness: Yes.

Mr. Rassner: No further questions.

Re-direct Examination by Mr. Gray:

Q. Doctor, in the prior trial this chart which you have produced and which has been offered in evidence was not used, was it? A. No.

Q. Nor any similar graph? A. No.

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Philip M. Stimson—Re-direct.

Q. And is your testimony as illustrated by this chart intended to enlighten the Court on parts of the subject which you thought were very indistinctly elucidated before? A. Yes.

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Q. Now, if this vessel was at sea during all these symptoms which Mr. Rassner has discussed, after the 24th of November, 1945, and when it was beyond the possibility of the ship to provide medical attention other than that aboard the ship, would you have considered that bad practice, to leave the man in bed and leave him undisturbed after he had reported sick? A. No; no.

Mr. Gray: That is all. Thank you.

Mr. Rassner: No further questions.

The Court: Is that all?

Mr. Gray: Yes.

The Court: All right, thank you, Doctor.

(Witness excused.)

The Court: We will now take a recess until half past two.

Have you got your witnesses here?

Mr. Gray: Yes, sir. I have two more witnesses here now.

The Court: Very well. Half past two.

(Recess until 2:30 p. m.)

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AFTERNOON SESSION.

The Court: All right, gentlemen.

Mr. Gray: Mr. Napier, will you please take the stand?

Mr. Rassner: May I call him as a witness?

Mr. Gray: I have no objection.

Mr. Rassner wishes to call him as his witness. I have no objection.

The Court: All right.

Patrick Edward Napier—Direct.

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PATRICK EDWARD NAPIER, called as a witness on behalf of the libelant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Napier, you were called here by the respondent; is that right? A. By Mr. Gray, yes, sir.

Q. You testified in the case of Robert A. McAllister against Cosmopolitan Shipping Company, Inc., did you not? A. Yes, sir.

Q. And at that time you were called by me as a witness on behalf of McAllister. Is that right? A. Yes, sir.

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Q. But before I had spoken to you or anybody of my office, or anybody connected with Mr. McAllister had spoken to you about the case, you had been down to Mr. Gray's office and discussed it, hadn't you?

Mr. Gray: That is objected to. That is more cross-examination than anything else. If he wants to make him his witness on direct examination—

Mr. Rassner: Perhaps I want to examine him as a hostile witness.

The Court: You are not impeaching him, or anything of that kind?

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Mr. Rassner: I just want the Court to know the circumstances under which he is here.

The Court: All right, go ahead.

Q. Is that correct? A. I don't remember where I went first. I probably did go down there. I know I went down to that office, but I don't know exactly what time.

Q. Didn't you testify the previous time that you had spoken to Mr. Gray and told him all about the matter before you had spoken to me or to anybody on my behalf, and that what you told the Court was the truth, the same as you told to Mr. Gray in his office? I pointed it out to

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Patrick Edward Napier—Direct.

you this morning. A. Yes, sir, but you have changed the wording, as it was—

Q. All right, you tell us in your own words. A. I believe I stated, sir, that I had been down to the office, and that I talked with Mr. Gray, and we had talked over substantially the same material as I testified to five years ago.

Q. Before anybody on behalf of the plaintiff spoke to you? A. I think so, yes, sir.

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Q. Now, you were called here today by Mr. Gray, were you not? A. Yes, sir.

Q. How many days before the 24th—let me ask you this question—question withdrawn.

Do you remember when you made an illness report as to Mr. McAllister? A. Not the exact date.

Q. Let me show you something and ask you if this refreshes your recollection.

I show you this paper, Respondent's Exhibit D, and ask you to look at that and tell us on what date you made that report. A. This is a medical report which was made out when I was talking with Mr. McAllister in the hospital.

894

Q. And what date did you say that the illness was first reported to you officially? A. About the 26th.

The Court: The 26th of what?

Q. Take a look at that report and see. A. This, sir, does not say when it was reported to me. This says, "Illness contracted", and the date here is on the 24th.

Q. All right, now your testimony today is that the report of illness was first made to you on the 26th of November, 1945? Is that right? A. I say approximately that date. I don't remember the exact date.

Q. Well, let me ask you if this refreshes your recollection that it was several days before the 24th that you first learned of the illness and made an official report on the 24th.

My question is, do these questions and these answers refresh your recollection that the illness was reported to you several days before the 24th, and that you knew, from general conversations aboard the ship, that Mr. McAllister was sick several days before the 24th, but that on the 24th you officially reported it.

Let me read the questions and answers and ask you if they refresh your recollection.

Folio 15 —at the bottom of the page:

(Reading)

“How many days before this 24th? A. I don’t remember.”

896

Mr. Gray: Wait a minute. I object to that. That is not complete.

Mr. Rassner: All right, do you want me to go back?

Mr. Gray: Yes.

Mr. Rassner: I will go back.

Mr. Gray: Yes. Let’s get it complete.

Mr. Rassner: (Reading):

“Q. Will you be good enough, Mr. Napier, to look at Plaintiff’s Exhibit 4. Will you tell us the exact date upon which that report was made out by you?”

897

That is referring to the same paper which is now Respondent’s Exhibit D.

(Continuing reading)

“A. No, sir.”

This is direct examination.

(Continuing reading)

“Q. Now, I call your attention to Item 6 on the first page, and there is a date there, November 24, 1945, as the date illness contracted. Will you tell us about that and what does that mean? A. Well, generally, in a case of this type, when you put down the date of illness contracted, you ask the person for whom you are filling out this report.

I asked Mr. McAllister what date he contracted the illness as far as he could ascertain. Well, this is the date that I have written down—November 24, 1945.

“The Court: That is in your handwriting is it?”

“The Witness: Yes, sir.

“Q. Now, is that the first time that you knew that Mr. McAllister was ill or had it been called to your attention on a previous occasion? A. I remember talking to Mr. Linnartz about this case and I went to see Mr. McAllister and Mr. McAllister said he was feeling all right.

“Q. How many days before this 24th? A. I don't remember.

“Q. Well, approximately. Just your best recollection? A. About two days.

“Q. And your best recollection is that about two days before the 24th you spoke to Mr. McAllister. Can you tell us what that conversation was? A. As near as I can remember I stopped by his room and asked him how he was feeling. He said he was feeling all right, so I let it go at that.

“Q. What were the circumstances which caused you to go to his room and inquire about his condition? A. I knew that he had not been feeling too well.

“Q. How did you learn that? A. From conversation aboard ship that had never been reported to me.

“Q. The date it was officially reported to you was the 24th? A. That is right.

“Q. What, if anything, did you do about it then? A. There wasn't very much I could do about it because we were at sea and he was already in bed on the 24th, so I couldn't give him any treatment because I didn't know what was wrong with him. I cannot diagnose the case.

“Q. Do you know what illnesses were prevalent at Shanghai about the 20th, the 21st? Do you?”

And there was an objection at this point which was overruled.

(Continuing reading)

"A. I cannot state specific illnesses which may have been prevalent in the Port of Shanghai at that time. However, I do remember taking out a paper which was given to me by the skipper or the captain, and I typed out several of those and posted them all over the ship. I don't remember what illnesses.

"Q. Can you tell us to the best of your recollection?

A. I can't state specifically what was on that list.

902

"Q. Does any come to your mind included on that list?

A. That would be hard. I don't remember any specific illnesses. I do recall the report saying be careful what we were eating and be careful of the place we went to, and specifically not to eat ice cream ashore.

"The Court: That would be a notice, I suppose, that would be posted in any port you went into, including New York or Boston. It would be a general notice that would be applicable almost any place that the ship touched where the sailors went ashore. I don't know that; I am just wondering if there isn't always some precaution taken by the ship when a ship lands in an alien country.

903

"Mr. Rassner: At least there should be.

"Q. In any event, were there specific diseases listed in that notice? A. As near as I remember.

"Q. In other words, specific diseases were mentioned but you don't know exactly what they were? A. That is right.

"Q. But you don't remember what they were? A. I can't remember.

"Q. When you learned that Mr. McAllister was confined to his bed, did you go to see him? A. Yes, sir.

"Q. And that would be about the 24th that he was confined to his bed? A. Yes."

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Patrick Edward Napier—Direct.

Q. Was that your testimony, Mr. Napier? A. It sounds like it.

Q. Is it true? A. It was true, yes, sir.

Mr. Gray: I haven't interrupted, but this is no way—

The Court: I was wondering whether there was going to be an objection—

Mr. Gray: Well it is a fact, and I didn't want to waste time.

905

Mr. Rassner: Did I misread any of the testimony?

Mr. Gray: No, but that is not the way to examine a witness on direct.

Mr. Rassner: Wait a minute.

If the Court please, this witness testified that it was about the 26th that it was officially reported to him, and I plead surprise and therefore claim the privilege of refreshing his recollection.

The Court: That is all right.

Mr. Gray: All right, I withdraw the objection.

The Court: There is no objection to that.

Mr. Gray: It is all right.

906

Mr. Rassner: (Reading):

“Q. Now, tell us what you observed as near as you can recall? A. As near as I can recall he was lying in his bunk and said that he felt very bad.”

Did you so testify?

Mr. Gray: It is conceded that he did.

The Witness: It is written there, sir, five years ago, I must have testified to it.

Q. Did you testify to the truth when you testified the last time, sir? A. Certainly, sir.

Mr. Rassner: All right.

The Witness: I had no reason to lie about it.

Patrick Edward Napier—Direct.

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Mr. Rassner: All right, that answers my question, Mr. Napier.

The Witness: Yes, sir.

Mr. Rassner: (Reading):

“Q. Were you able to observe how he moved about? Do you remember that? A. I don't remember.”

Mr. Gray: I object to that. That has nothing to do with the contradiction as between the 24th and the 26th.

The Court: Yes. Why don't you ask him the direct question? 908

Mr. Rassner: All right.

Q. Did you have other diseases aboard ship that you were taking care of? A. Yes, sir.

Q. What kind? A. We had about 11 cases of venereal disease, gonorrhea, and I had one case of syphilis that I was treating at the time.

Q. Do you remember the symptoms that you observed about McAllister on the 24th when you went and found him lying on his bunk, in bed? A. I believe, sir, that they are written down. (Witness refers to papers.) As near as I can remember, Mr. McAllister was lying in his bunk and he said that he was feeling badly. Now, I don't recall right now much other than that. 909

Q. Well, does this refresh your recollection—folio 209—

(Reading):

“Q. Do you recall any of the symptoms that Mr. McAllister had when you saw him on the 24th? A. I just remember he was weak, and he was lying on his bed.”

Does that refresh your recollection? A. Yes.

Q. All right, now, did you report that condition to anybody? A. Well, I don't know whether I did or not. I can't remember that far back.

910

Patrick Edward Napier—Direct.

Q. Well, does this refresh your recollection:

(Reading):

"Q. Did you speak to anybody about Mr. McAllister's illness? A. I reported it to the Captain.

"Q. When? A. I don't remember the exact day. It should have been the same day. I believe it was.

"Q. That is your best recollection? You reported it the same day? A. Yes, sir.

911

"The Court: That is on the 24th?

"The Witness: That is, or about the 24th. I don't remember the exact date.

"Q. The 24th is your best recollection? A. That is right."

Does that refresh your recollection that you reported this illness of McAllister to the Captain the day you found that he was ill, which was the 24th of November, 1945?

Mr. Gray: I object to that. It was not the 24th. He said about that time. You have misstated his answer.

912

Mr. Rassner: No, I have not misstated his answer. He said it was the 24th. I asked him, was it the 24th, to his best recollection, and he said yes.

Q. Does that refresh your recollection that on the 24th of November you found McAllister lying sick in bed in a weakened condition, and reported that condition to the Captain the same day? A. I don't remember right now whether I reported it to Captain Leavitt the same day.

Q. I am asking you, does that refresh your recollection.

The Court: Well, do you remember whether or not it was a day or so prior to the making out of this paper?

The Witness: It probably was, sir. I could

not be positive now. It has been eight years since I did that.

The Court: Now, do you know anything about the conditions on the shore at that time? You said you got a notice up, that there was something, polio, or something there.

The Witness: I remember that a notice was posted on the bulletin board, because I typed copies of it and put them up on the bulletin boards over the ship, stating that there were illnesses ashore, contagious diseases, but as to what diseases, I don't remember what the paper said.

914

The Court: You can't remember?

The Witness: No, sir.

Q. Now, do you remember your conversation with the Captain about Mr. McAllister on the 24th of November, 1945? A. No, sir, I don't.

Q. Does this refresh your recollection—at the bottom of page 70.

(Reading):

“Q. Do you remember the conversation you had with the Master, the substance of it? What he said to you and what you said to him? A. I told him Mr. McAllister wasn't feeling good and that when we got to port we should try to get him to the hospital and get a checkup.

915

“Q. What did the Master say? A. He said we will see later.”

Does that refresh your recollection as to the conversation? A. Yes, sir.

Q. Was it true? A. It is true.

Q. What did you consider the symptoms — as indicating what?

Mr. Gray: What is that question?

Mr. Rassner: Question withdrawn.

Q. Did you consider the symptoms?

Mr. Gray: What symptoms?

Mr. Rassner: That McAllister had.

Mr. Gray: On what day?

Mr. Rassner: On the 24th.

Mr. Gray: If he saw him.

Mr. Rassner: He said he did.

Q. What did you consider the symptoms of McAllister in your capacity as a Pharmacist's mate? A. Well, not
917 being a medical doctor all I could do when I saw that he was feeling bad is make him comfortable the best I could.

Q. Did you consider him as being in a very sick condition? A. No, sir.

Q. Does this refresh your recollection that you did consider him to be in a very sick condition? A. All right.

Q. Page 71 — (reading)

"Q. And did you consider the symptoms? A. At that time I could not state any specific symptoms as to any specific disease. I did tell him Mr. McAllister was in a weakened condition. He could be very sick. I didn't know."

918 Does that refresh your recollection? A. Yes, sir. I said he could be very sick.

Q. Is that true? A. Yes, sir.

Q. And you told that to the Master? A. Yes, sir, and he could be very sick. I didn't say that he was, I don't believe, because I wouldn't be qualified to do that.

The Court: What were your duties aboard ship?

The Witness: My main work was to take care of the clerical duties aboard, the payroll work, make notations as to how many people were discharged from the ship, or signed on, for payroll purposes.

The Court: You had no doctor on board, did you?

The Witness: No, sir. I was what was called a Pharmacist's mate.

Patrick Edward Napier—Direct.

919

The Court: And you could give them bicarbonate, or something like that?

The Witness: I could give them aspirin for a headache, and in minor injuries, I could take care of the injuries, but as far as diagnosing diseases, that was out of my line.

Q. Did you consider that McAllister's condition was the type of illness that was beyond your capacity to treat? A. Well, at the time, sir, I did not know. That is why I wanted to get him ashore.

Q. Did you suggest that he be seen by a doctor immediately? Did you suggest that to the Master? A. I think so.

920

Q. That is your best recollection? A. Yes, sir.

Q. How many times did you suggest to the Captain on or after the 24th of November, 1945, that in your opinion McAllister was so sick that he should be seen by a doctor?

Mr. Gray: I object to the question as a misstatement.

When you say "on or after the 24th,"—the witness doesn't say he told him on the 24th. He said he told him sometime around there. He does not know when.

921

The Court: Ask him how many times did he talk to him.

Mr. Rassner: Yes.

Q. How many times did you talk to the Master? A. Well, I couldn't say a definite number, but I believe it was several times.

The Court: You saw him every day, didn't you?

The Witness: Oh, yes, sir.

Q. And you kept calling McAllister's condition to the attention of the Captain, did you not? A. Sir, I had 11 other cases to take care of—

Q. I am not talking about other cases now. I am talking about McAllister. A. Yes, sir.

Q. Did you call Mr. McAllister's condition to the Master's attention on the 24th and on each and every day after the 24th of November, 1945, until McAllister was removed from the ship? Yes or no. A. I can't answer that.

Q. Does this refresh your recollection — A. (Continuing) If I had the book, maybe I could keep up with it.

Q. Maybe this will refresh your recollection. Folio 212. (Reading)

“Q. Did you mention it to him daily”—that is referring to the Captain—“until Mr. McAllister was removed from the vessel? A. I was making practically daily trips to the hospital in Tsingtao and I spoke to the skipper a couple of times about it that I can remember, about Mr. McAllister.”

Does that refresh your recollection? A. It sounds right.

Q. Now let me ask you what the symptoms were that you reported.

Mr. Gray: At what time?

Mr. Rassner: At any time.

Q. What were the first symptoms that you reported to the Master?

Mr. Gray: If any. He doesn't say that he reported any symptoms to the Master. He said he told him the man was sick.

Mr. Rassner: If any. I will take your correction. (Addressing the witness) If any.

A. I don't recall. As near as I can remember, though, about all I would have said to Captain Leavitt would be that Mr. McAllister was sick or appeared to be sick.

Q. And whatever symptoms you observed about McAllister — did you report all those symptoms to the Master?

A. Well, I don't think it would have interested this Captain Leavitt. I don't remember.

Q. All I asked you — A. I don't remember.

Q. All I asked you is did you or didn't you, or don't you remember? A. I don't remember.

Q. Does this refresh your recollection? Folio 215. (Reading)

"Q. Although you don't remember exactly what the symptoms were, you knew whatever they were you reported about them to the Master? A. That is right.

"Q. And that was done on several occasions between the 24th of November and the 1st of December, 1945? A. Yes, sir."

Does that refresh your recollection? A. Yes, sir, it does.

926

Q. Was that true? A. Yes, sir.

Q. Well, now, what medical facilities were available at Shanghai at the time?

Mr. Gray: Wait a minute.

That is objected to. "At the time" is too indefinite.

Mr. Rassner: From the 24th to the 1st of December.

Mr. Gray: Well, it is immaterial what was in Shanghai on the 24th, because the ship wasn't there. The ship was at sea on the 24th. I object to it as immaterial and irrelevant.

927

Mr. Rassner: Question withdrawn.

Q. Now, how far was the ship away from Shanghai between the 24th of November and the 1st of December — the furthest distance in mileage that that ship was away from Shanghai? A. I could not answer that.

Q. Between the 24th of November and the 1st of December. Was it more than a few hours away — sailing time?

Mr. Gray: At what time?

Mr. Rassner: At any time between the 24th of November and the 1st of December.

A. I can't answer that, sir. I don't know.

Q. At any time between the 24th day of November, 1945, and the 1st day of December, was that ship more than a few hours away from Shanghai? A. I can't answer that, sir. I wasn't the navigator.

Q. What was the furthest port you went to from Shanghai? A. As near as I can remember we proceeded from Shanghai up to Tsingtao.

Q. How long does it take — how long did it take to get from Shanghai to Tsingtao? A. I don't remember.

Q. Was it a matter of hours, or was it a matter of days? A. I couldn't even remember that. It probably would be about two or three days. It should be about two or three days' journey.

Q. Up and back? A. We didn't come back directly to Shanghai from Tsingtao.

Q. Where did you go?

Mr. Rassner: Well, I won't press that. We have the itinerary.

Q. What medical facilities were available at Shanghai? Do you remember?

Mr. Gray: That is objected to. The same question. At what time?

Mr. Rassner: At any time between the 24th of November and the 1st of December, 1945.

Well, I will wait until the cross-examination.

Mr. Gray: It is immaterial.

The Court: What is the purpose of talking about medical facilities on shore at a certain time?

Mr. Rassner: Well, I want to demonstrate that that vessel was at Shanghai, according to the stipulation, on November 23rd —

The Court: Oh, well, don't spend too much time on that.

Mr. Rassner: I want to prove that the hospital ships were lying there practically alongside the ship.

Patrick Edward Napier—Direct.

931

The Court: Yes.

Mr. Rassner: May I ask that question?

The Court: Yes.

Q. Isn't it a fact that the *Repose*, a hospital ship, was right along your vessel during most of this time?

Mr. Gray: I object — "at this time" —

Mr. Rassner: Between the 24th of November and December 1st.

Mr. Gray: If you want to say while the vessel was in Shanghai, I will concede it.

932

Mr. Rassner: Well, if you will concede it I will go on further.

The Court: That is the end of that.

Q. There was an Army Base right across the river, was there not, from Shanghai, where the boat was? A. Yes, sir, I think so.

Q. And they had all the hospital facilities, did they not? A. I don't know what they had.

Mr. Gray: That is objected to. I assume they did. We will concede it for practical purposes.

The Court: All right.

933

Q. Now, what was the condition of McAllister on his discharge from the ship?

The Court: On what?

Mr. Rassner: What was the condition of McAllister on his discharge from the ship? When he left the ship.

The Court: All right.

Q. What was McAllister's condition? A. He had no appetite. He was dizzy. Unable to hold food on his stomach, and he was weak.

Q. Yes, sir. Now, you had first aid training, did you not? A. Yes, sir.

934 *Patrick Edward Napier—Direct.*

Q. You were trained at the United States Marine Service Training Station at Sheepshead Bay, were you not? A. Yes, sir.

Q. And what other training did you have? A. I had one month at the Marine—United States Maritime Hospital, down in Baltimore, Maryland.

Q. Did you have a book entitled "First Aid at Sea," available while you were on the ship? A. Yes, sir, we did.

935 Q. Did you consider that the condition was such that with the aid of "First Aid at Sea" you were able to diagnose the condition, or did you think that a doctor's presence was imminent? A. Well, I could not diagnose it with all I knew.

Q. And did you tell the Master that? A. Yes, sir, as near as I can remember.

Q. And that was about the 24th? A. If I could not diagnose it—I knew that the fellow was feeling bad and that he should see a doctor, and that is standard procedure.

Q. And you told that to the Master? A. Yes, sir, I think so.

Q. And that was about the 24th of November, 1945?

936 Mr. Gray: That is objected to. He is leading him. I ask that the questions be not leading.

The Court: At what time was it?

Q. When was it? What date? A. I can't remember the date.

Q. What is your best recollection? A. Between the 24th of November and the 1st of December.

Q. You never diagnosed this case and made no attempt to diagnose it; isn't that so? A. I might have made an attempt to diagnose it, but I could not diagnose it.

Q. And as a matter of fact you never did diagnose the case? A. No, sir.

Mr. Rassner: Your witness.

Cross-examination by Mr. Gray:

Q. Mr. Napier, what training did you have at the Sheepshead Bay Hospital, or at the Sheepshead Bay Training Center? A. I had a twelve-week course—six courses covering anatomy and physiology, emergency treatment, minor surgery, hygiene and sanitation, clinical, laboratory, pharmacy, and there was one other class—I believe it was emergency treatment of minor surgery, if I did not mention that.

Q. And first aid? A. Yes, sir. That would be taken in along with all of them there.

Q. And at the Baltimore Hospital where you were trained for one month, what type of training did you have there? A. I spent one week in what is called the dressing room, where patients would go to have their wounds dressed, their sores dressed. That gives us training in bandaging.

938

I spent the other three weeks in different wards. I spent one week in the gonorrhoea, I believe, and the other two weeks just in general wards.

Q. And were your duties more those of an attendant than anything else? A. We more or less had the free run of the hospital, so that we could learn whatever we thought we needed.

939

Q. What is your present occupation, Mr. Napier? A. I am a high-school teacher.

Q. Where is your home? A. Hazard, Kentucky.

Q. And that is where you came from to appear here today? A. No, sir. I came from Whitesburg, or, rather, Letcher, Kentucky. That is about twenty-eight miles further south.

Q. What has been your occupation for the last three years? A. United States Army rifle man.

Q. Have you been in Korea lately? A. I got back on September 4, sir.

Q. Now, will you please describe to his Honor the type of bunk that McAllister had in his cabin? A. Yes, sir. He

was an officer, so we were up on the superstructure, up, I believe it is called on the boat deck. A very good bunk, about three feet wide, maybe a little more. About six feet long. It had a couple of draws underneath the bunk. It had springs about six inches thick with a very good mattress on top. Clean linen every week, and a good pillow.

Q. Between the 24th of November and the first of December, did you at any time take McAllister's temperature? A. Yes, sir.

Q. Do you recollect when you took his temperature with respect to the time he reported that he did not feel well? A. When he said he didn't feel well I took his temperature.

Q. And what was the result? Did you find that he had a high temperature? A. He had no temperature, sir.

Q. His temperature was normal? A. That is right, sir. That is why I did not write it down.

Q. And do you know whether you took his temperature more than once during that period? A. I don't recall right now, but I believe that I did. I am not certain.

Q. Was he offered food during this period? A. Yes, sir.

Q. To your knowledge? A. Yes, sir, he was.

Q. Did you order any food brought to him for his meals?

A. Yes, sir.

Q. What did he do with respect to the food that was offered him? A. He didn't eat it.

Q. During this period did he ever tell you that he had any pains in any of his muscles? A. Yes, he did.

Q. And did you make a record of it? A. No, sir, I don't think so.

Q. Now, I show you Respondent's Exhibit D and ask you to state whether or not you obtained the information on there as to his symptoms from him or from some other source. A. Well, I had had an opportunity to talk with Mr. McAllister at the hospital, and then I had been watching

him for several days, also, so—he said he was dizzy, and I knew that he was unable to hold food, and I knew that he had no appetite, because he had not been eating, and he was in a weakened condition.

Q. He told you he was weak, didn't he?

Mr. Rassner: Now, that is not what he told him, Mr. Gray. He just told you that he observed it. Are you trying to change his testimony?

Mr. Gray: Not at all. I am examining the witness. I have a right to lead him.

Mr. Rassner: I object. He has already answered the question. I object on the ground that it is repetitious.

944

The Court: What was the question?

Mr. Rassner: May I have the question read? I want to show your Honor that that is not what the witness said in the previous question and answer.

May I have it read?

The Court: What is the—

Mr. Rassner: The previous question and answer, in which he states what he observed. I would like to have that read.

Mr. Gray is trying to tell the witness to say that the information is not what he observed, but that it is what McAllister told him.

945

Mr. Gray: I object to that. I did not do any such thing.

Mr. Rassner: Let's have the reporter read the previous question and we will see.

I say that that is exactly what you are trying to do—to have the witness change his testimony. When he says he observed it, now you are trying to say that that is what McAllister told him.

May we have the question read, and I will show your Honor that that is exactly what Mr. Gray is

946

Patrick Edward Napier—Cross.

trying to do—to have the witness change his testimony.

Mr. Gray: How can I have the witness change his testimony, when—

Mr. Rassner: If your Honor please, may I have it read, and it will show that what I say is so?

The Court: All right, what is the question?

Mr. Rassner: Will you read the question and answer, please?

(Question and answer referred to read by the reporter as follows:

947

“Q. Now, I show you Respondent's Exhibit D and ask you to state whether or not you obtained the information on there as to his symptoms from him or from some other source? A. Well, I had had an opportunity to talk with Mr. McAllister at the hospital, and then I had been watching him for several days, also, so—he said he was dizzy, and I knew that he was unable to hold food, and I knew that he had no appetite, because he had not been eating, and he was in a weakened condition.

“Q. He told you he was weak, didn't he?”)

948

Mr. Rassner: That is what he observed, and not what McAllister told him. He said he knew, from observing him, that he could not hold food—

The Court: Ask him how he knew.

Q. How did you know that McAllister was weak?

The Court: That is right.

A. Well, the fellow had been lying in bed for several days except for the matter of times when he would get up—I don't know how many of those there were—and he appeared to be weak—I will put it like that. Whether or not he was weak, it would be not for me to state, but I would say that he was in a weakened condition, looking at him.

Q. During that period did McAllister tell you that he felt weak? A. Yes, sir, I think so.

Q. When you say he got up from time to time, for what purpose did he get up? A. Why, he went to the John.

Q. To the "head"? A. Yes, sir.

Q. To the toilet? A. Yes, sir.

Q. And did he make any complaint to you about his being unable to go to the toilet properly? A. No, sir.

Q. Was this bunk that he had comparable to a comfortable bed that you get ashore? A. Yes, sir.

Q. How far from his room was the "head"—the officers' "head" that he used? A. About thirty or thirty-five feet. 950

Q. It was in the same superstructure where his cabin was? A. Yes, sir.

Q. And on the same floor that his cabin was on? A. Yes, sir.

Q. I mean the same deck. A. The same deck—the boat deck.

Q. What is your best recollection as to the time that this illness report which you have in your hand, Respondent's Exhibit D, was made out? A. I believe this was made out when McAllister was in the hospital.

Q. Ashore? A. Yes, sir.

Q. That would be on or after December 1? A. On or after December 1. 951

Q. While he was ashore in the hospital did you visit him? A. Yes, sir.

Q. And what did you learn during your visits? A. Well, nothing. I mean I knew that he was sick, and that we would probably have to discharge him there.

Q. As a matter of fact, you did discharge him there, didn't you? A. Yes, sir, I did.

Q. And did you make an entry in the official log as to his discharge on that day? A. Yes, sir.

Mr. Rassner: There is no dispute about that.
Mr. Gray, I will concede that. There is no dispute about that.

952

Patrick Edward Napier—Cross.

Mr. Gray: I have a photostatic copy of the official report.

Mr. Rassner: I just said that there is no dispute about that. I concede it.

Q. Were you present when they made a spinal tap at the hospital? A. Yes, sir, I was.

953

Q. Now, who made the arrangements for Mr. McAllister to go ashore, to the hospital? A. I had gone up to the hospital, either on or about the 29th or 30th, I don't remember the exact date, of November, to see about another patient, and they said they would like to get McAllister ashore for observation. Arrangements were made then through that Marine Corps Hospital to look after him.

Q. And did a Lieutenant Commander, a medical Lieutenant Commander, from the Marine Corps, come aboard the ship? A. Sir, I wasn't aboard that day, if he came—I was not aboard the day that McAllister went to the hospital.

Q. You were not aboard the day that McAllister went to the hospital? A. I was on board that day, I will put it that way, but not at the time that he was taken off the ship. I don't know who got him.

954

Q. What is your present recollection as to the time interval between your arrangements for McAllister to enter the hospital and his actual leaving the ship? A. I could not—I don't remember that. I made the arrangements either the afternoon before or that morning. I don't remember which.

Q. And after McAllister was taken ashore, did you get a document from the Marine Corps doctor, showing his disposition? A. Yes, sir.

Q. I show you this paper—

Mr. Rassner: I have no objection to it. You can offer it right in evidence.

Mr. Gray: Well, first, I would like to have the witness identify it.

Q. Is that the paper which you received from the medical officer of the Marine Corps hospital in connection with the acceptance of Mr. McAllister at the hospital? **A.** Yes, sir, that is it.

Mr. Gray: I offer it in evidence.

Mr. Rassner: No objection.

(The paper referred to was marked Respondent's Exhibit J in evidence.)

Q. Now, in fact, Mr. McAllister never reported ill to you with venereal disease, did he? **A.** No, sir.

956

Q. And you never reported him to the Master as having reported in with venereal disease, did you? **A.** No, sir.

Q. Referring to this Respondent's Exhibit D, there are certain notations made on there in pen and ink. Will you please look at them and tell me whether that is in your handwriting, or in the handwriting of someone else? **A.** Except for McAllister's signature, it is my handwriting.

Q. Did McAllister sign that in your presence? **A.** Yes, sir.

Mr. Rassner: There is no dispute about that, either.

Mr. Gray: Wait a minute.

957

Q. Do you remember where it was signed by Mr. McAllister? Was it on board ship or ashore? **A.** I don't remember. I believe it was ashore, in the hospital.

Q. Now, have you stated on this Respondent's Exhibit D all of the symptoms which Mr. McAllister told you of, or which you observed, prior to his discharge to the hospital? **A.** I stated the ones which were most prevalent at the time, I believe.

Q. The most prevalent ones? **A.** Yes, sir.

Q. If during that period he had shown a temperature, would you, in the ordinary course, have recorded that on the report? **A.** I don't think so.

958

Patrick Edward Napier—Cross.

Q. Did anyone else have polio on that ship during that voyage? A. To the best of my knowledge, no.

Q. Prior to November 24, 1945, did Mr. McAllister make any request to you for medical treatment or for hospitalization or for relief from any of his duties?

Mr. Rassner: I object to that as being entirely immaterial—whether he had made a request or not.

The Court: I will allow it. Go ahead.

Mr. Gray: Will you please read the question?

The Court: Read it, please.

959

(Question read.)

A. No, sir.

The Court: You saw him every day before the 24th, didn't you?

The Witness: Yes, sir.

The Court: Was he in his bunk then?

The Witness: Except when he was standing his watches. Most of the officers spent their spare time either in the officers' mess or in their bunks. I spent a good deal of my time in my bunk when there was no work to be done.

960

The Court: I mean you had no conversation with him that you can recall prior to the 24th?

The Witness: Not about any illness, not that I know of.

The Court: What about anything else? About serving his time on watches?

The Witness: No, sir. I don't recall any.

The Court: How did you come to see him in his bunk?

The Witness: His room happened to be right next to shower. The door was open, and I heard some of the fellows talking and saying that McAllister was sick, and, of course, I knew that if he was in his bunk he was off duty then, so I went in to see him, and I talked to him about it.

Q. The mere fact that an officer was lying in his bunk—would that arouse any suspicion as to his general health aboard ship? A. No, sir.

Q. While he was lying in his bunk, and at the time he laid off from doing his duties, did you keep watch of him to see if any other symptoms developed, which might have indicated to you any particular treatment that he should have had? In other words, did you watch his progress?

A. Yes. I checked by to see how he was getting along—to see if he was comfortable.

Q. And you also took care to see that he had food? A. Food was sent up to him at each meal, if he wanted it, yes, sir.

962

Q. Did you observe particularly whether or not Mr. McAllister went ashore at Shanghai between the 11th of November and the 22nd of November, when the vessel left the pier for Tsingtao? A. I did not notice particularly, no, sir, because I seldom went ashore with McAllister, myself.

Q. Did you observe whether the Chinese coolies and passengers were permitted to have the full run of the ship? A. No, they were not. No, sir. They were kept out of the passageways, because we had a crew there. That was the crew's living quarters and we just didn't want them in our home.

963

Q. How about the food? A. Well, our food was prepared in the ship's galley. I don't know about the Chinese cooks who—I think they ate rice most of the time. I don't know where it was cooked.

Q. Do you know whether the Chinese cooks also cooked the food for you and the crew? A. No, sir—well, we had Chinese cooks aboard the ship. We had Chinese cooks, but not the coolies. We had Teng Wen Sun, and Teng—

The Court: How many coolies came in?

The Witness: There must have been about fifty—forty to fifty. Not much more than that. We had aboard a few civilians—passengers, also. I don't know how many.

The Court: Any sick ones?

The Witness: One Chinese coolie came up with gonorrhoea. I treated him for that.

Q. He asked you for medical advice? A. Yes, sir. He wrote me a note. Somebody did. In English.

Q. There has been some discussion about the latrine which was built on the deck. Did you observe whether that was being properly cared for? A. Well, it was built at a cost of \$600. I took a picture of it. So it was built so they could have a salt water hose to wash the excreta over the—over the side. Now, most of them used that.

Q. Most of these Chinese coolies? A. Yes, sir, and they were not allowed on the inside of the ship, to use our latrines.

Q. How did you keep them out of the latrines? Out of the ship's latrines? A. Just standing there and seeing that they did not come in. We had crew members to take care of the doors. They knew they were not allowed to come in, so they did not come in. They did not swarm over us.

Q. From your observation, did they run all over the ship at all? A. No, sir. I know that they did not.

Mr. Gray: That is all.

Mr. Rassner: Just one question.

Re-direct Examination by Mr. Rassner:

Q. When Mr. McAllister was officially reported ill to you on the 24th of November—

Mr. Gray: That is objected to—"the 24th"—

Mr. Rassner: May I finish my question, and then I will be guided by his Honor's ruling.

Mr. Gray: Pardon me.

Mr. Rassner: Question withdrawn.

Q. When Mr. McAllister officially reported ill to you on the 24th of November, 1945, was he immediately taken off duty?

Mr. Gray: That is objected to on the ground that it misstates the evidence.

The Court: I will allow that.

Do you remember that?

The Witness: I don't remember the exact date that he was taken off duty. Now, he stood his watches. He spent his off-time in his bunk until we got to Tsingtao.

Q. Let me ask you this question: After you found that Mr. McAllister was sick in bed and you reported to the Master that you think he ought to have a doctor, did you or did you not arrange to have Mr. McAllister taken off duty? A. Sir, that would have been up to the Chief Engineer.

Q. Well, was he taken off duty, or wasn't he? A. Well, if he asked to be taken off duty he would have been taken off duty.

Q. Forget about what Mr. McAllister asked or did not ask. I am asking you that question. A. Did I take him off duty?

Q. That is what I want to know. A. I would have been out of place to do so.

Q. Wouldn't it have been up to you to suggest that he be or be not taken off duty? Was that not part of your duty? A. Well, I suppose it was part of my duty.

Q. Well, is it your best recollection that you carried out your duties the way you were supposed to? A. Well, I don't recall that I asked to have him taken off. Now, I may have asked Mr. McAllister if he felt like doing his work. I don't recall what I asked him.

Q. Well, as a matter of fact, do you or do you not remember whether McAllister, regardless of at whose re-

quest, was actually taken off duty the day you came— A. No, he wasn't taken off duty. He did his watches. He stood his watches.

Q. Until when? A. Well, until we got into port.

Q. On December 1? A. No. We came into port before then.

Q. When were you in port? A. We had to be there on the 30th, if I went on shore—I don't remember the exact date.

971 Q. Is it your recollection that he stood his watches after you reported that he required the attendance of a doctor, and that he was confined to his bed sick? A. I don't believe, sir, that I said that he required medical assistance. Now, I am not positive there. I think I might have stated that it would be good if he could be taken ashore.

Q. Didn't you tell the Master that in your opinion you thought that McAllister was confined to his bed and needed, or should have, a doctor see him?

Mr. Gray: On what date?

972 A. I think I said it would be good if we could get him ashore.

Q. On what date? On November 24, 1945? Do you understand my question? A. No, sir. I got lost there.

Mr. Rassner: Question withdrawn.

Q. I am talking about the 24th day of November, 1945, as recorded in your official report. Now, on that date is it your recollection that McAllister was taken off duty or not, or don't you know? A. No. He was not taken off duty then.

Q. Did he continue standing his duties after you reported him ill to the Master? A. Yes, sir.

Q. So he was kept on duty, doing his regular work,

after you had reported to the Master that the man, that McAllister, was sick in bed, and needed the attendance of a doctor?

Mr. Gray: That is objected to.

Q. Is that your testimony?

Mr. Gray: That is objected to. First, on the ground that it is leading and, secondly, on the ground that it implies something that the witness has not testified to, that he was obliged to continue with his duties.

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The Court: Can you answer that?

The Witness: Sir, I believe that he wasn't required to stand his watches. In other words, Mr. McAllister was the type of fellow that would go ahead and do his work as long as he could hold up. He didn't try to shirk his duty at all. Then if he—he said he felt he could stand his watches, so McAllister stood his watches. He was not obliged to stand those watches.

Q. And do you say that McAllister stood his watches after you reported to the Master that McAllister was sick in bed and needed the attendance of a doctor? Is that your testimony? A. I am getting lost here.

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Mr. Rassner: Well, I will ask the reporter, with the Court's permission, to read the question back to you. If you don't understand it, I will be glad to rephrase it.

The Witness: Well—

Mr. Rassner: Just a minute.

May I have the Court's permission to have the reporter read the question?

The Court: Yes.

(Question read.)

976

Patrick Edward Napier—Re-direct.

A. Now, I think we are getting our days too close together here. I think we are trying to crowd it all on to the 24th. Don't forget that there are more days there.

Mr. Rassner: Let me withdraw the question and reframe it.

Mr. Gray: Let him answer the question.

Mr. Rassner: I said I withdrew the question.

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Mr. Gray: I object. Just because he gets an answer that he doesn't like, he wants to withdraw the question. I ask that the witness be permitted to finish.

The Court: All right, reframe your question.

Q. On or about—let's put that way— A. Yes, sir.

Q. On or about, or after—after the 24th day of November, 1945, after you had reported to the Captain that Mr. McAllister was sick in bed and in your opinion required a doctor, did, in fact, Mr. McAllister stand his watches or not? A. Mr. McAllister stood his watches. Now, this business of requiring a doctor—

978

Q. Forget about requiring. Did he do it or did he not do it after you reported him sick to the Master? A. Yes, sir, he stood his watches.

Q. He still stood his watches? A. Yes, sir.

Q. After you had told the Master that McAllister was sick in bed and needed the attendance of a doctor? A. That he should see a doctor.

Q. That he should see a doctor. A. When we get him ashore, he should see a doctor.

Q. So after you reported that, he still stood his watches? A. He stood his watches of his own accord.

Mr. Gray: Is that all?

Mr. Rassner: No further questions.

Mr. Gray: Thank you, Mr. Napier.

(Witness excused.)

Testimony.

979

Mr. Rassner: Now, I would like to read into evidence, by consent, the information which has been obtained by the attorneys for Mr. McAllister—

Mr. Gray: Not by consent. We haven't consented to it yet.

(Discussion off the record.)

Mr. Rassner: You got the information last night, and we told you that if you wouldn't consent to it, we would call a man from the Union here to testify—

Mr. Gray: You are mistaken. I did not get the information last night.

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(Discussion off the record.)

Mr. Rassner: I ask for an adjournment to get the man from the Union here. My impression was that counsel would consent to this information going into the record.

The Court: What is it all about?

Mr. Rassner: The rate of earnings.

Mr. Gray: I told Mr. Dembo last night on the telephone that if he will give me the list of rates of earnings that he wants to put in, I will compare it and check it up with the MMI, the Merchant Marine Institute, where they always keep a record of these things, and if it is all right, I will consent to it.

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The Court: Have you got anything more before taking that into the record?

Mr. Rassner: No, sir, your Honor.

The Court: We will talk about that later.

Now, have you got anything more?

Mr. Rassner: Not for the libelant.

Now, if the Court please, I would like to tell you at the present time what the rates of wages of engineers were, working on this type of vessel, for 1945 to the present time. Part of this is contained in a printed agreement.

Now, I say that if Mr. Gray finds that any of our

982

Testimony.

information is inaccurate, I am perfectly willing to have that withdrawn, and I will offer proof.

The Court: All right.

Mr. Rassner: May I have that read into the record under that limited stipulation?

The Court: Yes.

Mr. Rassner: Mr. Dembo will read it in, if your Honor please.

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Mr. Dembo (Reading): On Class C vessels, which is a liberty vessel, for the period December, 1946, to June 15, 1947, the rate of pay of a second assistant engineer was \$316; first assistant engineer, \$361; and chief engineer, \$539.

Mr. Gray: I object to everything but second assistant.

Mr. Rassner: You don't question the accuracy of it, do you?

Mr. Gray: I may, but anything else is immaterial.

Mr. Rassner: Let us cut out this quibbling.

If the Court please, I ask leave to produce a witness to testify to this. I mean, this splitting of hairs after you made an agreement—

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The Court: This libelant was a second assistant engineer, wasn't he?

Mr. Rassner: Yes.

The Court: It won't do any harm. We know that he was a second assistant engineer.

Mr. Dembo (Continuing to read): Now, for the period from June 15, 1947, to December 15, 1947, the rate of pay of a second assistant engineer was \$346.50; a first assistant engineer, \$393.75; a chief engineer, \$580.65.

For the period from December 15, 1947, to June, 1948, the rate of pay of a second assistant was \$352.70; of a first assistant, \$402.93; of a chief engineer, \$601.60.

For the period June, 1948, to June, 1949, the

Testimony.

985

rate of pay of a second assistant engineer was \$373.86; of a first assistant, \$427.11; of a chief engineer, \$637.70.

For the period from July 20, 1950, to June 15, 1951, for a second assistant engineer, \$379.69; for a first assistant engineer, \$433.77; for a chief engineer \$647.65.

And, as amended October 11, 1950, including the period to June 15, 1951—second assistant engineer, \$411.89; of a first assistant engineer, \$469.42; of a chief engineer, \$696.95.

Now, according to an agreement, in book form, between the National Marine Engineers' Beneficial Association and the Committee for Companies and Agents, Atlantic and Gulf Coast, licensed personnel, and independent dry cargo companies, for the period from June 16, 1951, to July 15, 1953, on Class C vessels, as of June 16, 1951, the rate for a second assistant engineer is \$426.22; for a first assistant engineer, \$485.75; for a chief engineer, \$721.19.

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As of July 15, 1951, the rate of pay for a second assistant engineer is \$435.90; for a first assistant, \$496.78 for a chief engineer, \$737.57.

Mr. Gray: That is taken subject to my verification, your Honor. 987

Mr. Rassner: I consent to that.

The Court: Well, yes.

Mr. Gray: I have another witness to put on the stand. This will be very short.

Mr. Rassner: Will you wait just a minute, Mr. Gray?

Mr. Gray: Surely.

Mr. Rassner: The libellant rests.

The Court: All right, the libellant rests.

Mr. Gray: Mr. Jung.

FREDERICK A. JUNG, called as a witness in behalf of the respondent, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Mr. Jung, where do you reside? A. 272 Henry Street, Brooklyn, New York.

Q. Are you connected with the Cosmopolitan Shipping Company, Incorporated? A. I am.

Q. In what capacity? A. Assistant to the treasurer.

989 Q. And for how long have you held that position? A. The past ten years.

Mr. Rassner: In order to shorten the record the libelant has consented to permit Mr. Gray to dictate into the record this information, which ordinarily would have been obtained by questions and answers from the witness—of course, without conceding the truth of it— but that is in substitution of the testimony.

You may dictate it right to the reporter—anything you want to do.

990 Mr. Gray: Mr. Jung identifies the following overtime sheets showing payments of overtime made to the first assistant engineer, Mr. Bullis, to the second engineer, Mr. McAllister, to the third engineer, Mr. Luman, and to the substitute third assistant engineer, Mr. Kavanaugh, and to the deck engineer, Mr. Benz, for the period from November 11, 1945, to December 1, 1945, for the purpose of showing that no overtime was paid to any of these men listed for work done as a substitute for Mr. McAllister, and also that the amount shown on Mr. McAllister's overtime sheet, ending with November 16, which has already been marked in evidence, was actually paid to Mr. McAllister, and that these overtime sheets were made out before the various officers

Frederick A. Jung--Direct.

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left the ship and were signed by them at the time they left the ship, and that they were certified to as correct by the chief engineer, a gentleman by the name of Mjoen.

I also state for the record that the chief engineer, Mr. Mjoen, died in 1950, and therefore has not been produced as a witness.

Now, we also produce—

Mr. Rassner: We don't question that you have read that into the record correctly. We don't question that, your Honor.

The Court: Read it into the record.

992

Mr. Rassner: Anything you want.

Mr. Gray: It appears from these records of Cosmopolitan Shipping Company, Incorporated—

The Court: Let the witness read it right in. You know what that is, don't you, Mr. Jung?

The Witness: Yes, sir.

Q. Mr. Jung, will you please state on the record whether these overtime records which I have designated contain any payments for overtime to any of these gentlemen for work that was done for the account of, that is, for work that was done as a substitute for Mr. McAllister, in standing his watches, or doing any of his work, prior to the 1st of December, 1945? A. December 1, 1945—starting with what date? November 11?

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Q. Between November 11 and December 1. A. On Mr. Bullis there was none paid. To Mr. Luman, none paid. Do you want to know the overtime we have which was paid to Mr. McAllister between November 11 and December 1?

Q. No. A. All right.

Q. Does it appear on those records that McAllister was paid overtime for standing a security watch from midnight on November 26 until 8 a. m. on November 26? A. That is here, yes. He got overtime.

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Frederick A. Jung—Cross.

Mr. Rassner: What date?

The Witness: November 26. Eight hours.

Mr. Rassner: When?

The Witness: November 26, 0001 to 0800.

Q. Midnight? A. Night engineer.

Mr. Rassner: Midnight of the 26th to the morning of the 27th?

986

The Witness: No. November 26, from 0001 to 0800. In other words, from 12 midnight to eight in the morning.

Q. In other words, it was from midnight on the 25th?

A. Yes, from midnight on the 25th.

Q. To 8 a. m. on the 26th? A. That is what I said. 0001 to 0800. Nothing for Mr. Kavanaugh. Now, the next is Mr. Benz.

Q. Mr. Benz. A. No— That shows none paid to him.

Mr. Gray: You may inquire.

Cross Examination by Mr. Rassner:

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Q. Did you pay overtime in November of 1945 to men who worked on Sundays— A. Well, that I will have to check through here. For what period?

Q. November of 1945. A. November of 1945? (Witness refers to papers.) Let's see what this shows here.

Q. November of 1945. A. Just in November? Not after that?

Q. Yes. A. From the 1st to the 30th of November?

Q. That is right. A. I have one here on November 25, on watch, Sunday, in port. That is Tsingtao. To a man by the name of Jackson, A. B.

Q. I think you can answer the question now. So on Sunday you paid overtime to any man that stood his watch on Sunday; isn't that so? A. Yes, I believe so.

Testimony.

997

Q. And November 25 was on a Sunday; isn't that so?
A. According to this here record. I would have to check the calendar.

Q. You have it right in front of you. You said November 25— A. Yes. It is marked Sunday. The year is not shown on the top.

Q. So no matter who stood the watch, whether it was McAllister or somebody else standing for him and having McAllister sign his name, that would be recorded as over-time payment, wouldn't it? A. Yes.

Mr. Gray: That was on Sunday, the 25th—not from midnight on Sunday the 25th to 8 a. m. Monday morning?

998

The Witness: No. This here, in particular, is for an A. B., and it is from 2000 to 2400—2000 to 2400.

Mr. Gray: Now, if the Court please, I offer in evidence a copy of the Union contract between the Union engineers—

Mr. Rassner: No objection.

Mr. Gray: It is for the purpose of showing what the Union contract was.

The Court: Yes.

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(The document referred to was received in evidence and marked Respondent's Exhibit K.)

Mr. Gray: If your Honor please, may we adjourn until two o'clock Wednesday afternoon? If that is convenient for the Court. To take testimony of my other two medical experts.

The Court: You want an adjournment to next Wednesday?

Mr. Gray: Yes, sir.

The Court: All right.

Mr. Rassner: May I have that date?

Mr. Gray: Wednesday, the 21st, at two p. m.

Mr. Rassner: May I ask for what purpose?

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Testimony.

The Court: He said he has two doctors.

Mr. Rassner: We have the testimony of both doctors. I consent to their testimony coming in. I object to the adjournment, because we have—

The Court: I think perhaps we have gained knowledge during the past four years that may be enlightening in connection with polio, and you might want to have the doctors here—

Mr. Gray: I do, sir.

The Court: Yes. That is all right.

1001

Have you got anything more?

Mr. Rassner: Not unless something develops which has not been developed on the previous trial—

The Court: All right.

Mr. Rassner: —by Mr. Gray.

The Court: Yes.

Will you finish next Wednesday?

Mr. Gray: Yes, sir.

Mr. Rassner: If your Honor please, may I ask if Mr. Gray intends to produce any evidence which was not produced at the previous trial, because if he does not, the libellant does not intend to call any further witnesses. The only thing that would happen would be, if he does call other witnesses that weren't called at the previous trial, I may be compelled to ask for an adjournment, to get further proof.

The Court: I will see to it that both sides are protected that way. Don't worry about that.

Mr. Rassner: Thank you.

The Court: But I do think that we have made a good deal of progress as it is, and I hope that on the 21st we can close it.

Mr. Gray: I expect to.

Mr. Rassner: Is that in the afternoon?

Mr. Gray: Two o'clock.

The Court: All right, two o'clock on the 21st.

1002

Testimony.

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Now, the adjournment is for the purpose of calling Mr. Gray's witnesses, those two doctors, or such witnesses as you produce, and that will finish the respondent's case.

Mr. Gray: Yes, sir.

The Court: But it is understood that if something new arises, something that the testimony develops, that is unexpected, since the last trial, then both the libellant and the respondent have an opportunity to meet it.

Mr. Gray: Yes, and by that I don't mean to concede that I have not already adduced evidence that was not available at the other trial.

1004

The Court: Well, you are very careful about those things.

Two o'clock on the 21st.

(Adjourned until Wednesday, January 21, 1953, at two o'clock p. m.)

Brooklyn, New York,

January 21, 1953,

2:00 P. M.

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Appearances

(As heretofore noted.)

Trial Continued.

Mr. Gray: If the Court please, at the conclusion of the last session in this case Mr. Dembo read into the record considerable payroll data. We have investigated it and we find that it is substantially correct, and we consent to its going in as the correct figures, without, however, admitting the materiality.

The Court: Very well.

1066

Beverly Chaney—Direct.

Mr. Gray: Dr. Chaney, will you please take the stand?

BEVERLY CHANEY, called as a witness on behalf of the respondent, United States of America, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

1007 Q. Dr. Chaney, are you a physician duly licensed and qualified to practice in the State of New York? A. I am.

Q. Will you please tell us where you received your diplomas? A. I graduated from Medical College of Virginia in 1918. I was licensed in the State of Virginia in 1918. I was licensed in the State of New York in 1920.

Q. What has been your medical experience since that time? A. I have been continuously associated with the Neurological Institute of New York since March, 1919, and at the present time I am Attending Neurologist and Chief of Neurological Service in the Neurological Institute at the Presbyterian Hospital.

I am Clinical Professor of Neurology at the College of Physicians and Surgeons, Columbia University.

1008 I am a Diplomate of the American Board of Psychiatry and Neurology.

I am Consulting Neuropsychiatrist at a number of other hospitals.

My private practice is limited to nervous and mental diseases since May, 1920.

Q. And are you now actively engaged in the practice of medicine? A. I am.

Q. That is, you are specializing in neurology and psychiatry? A. Yes, sir.

Q. Have you had any experience in the treatment of acute anterior polio cases? A. I have.

Q. Can you give us a general idea of what that experience has been? A. Throughout my 34 years' stay at the

Neurological Institute there have been, either directly under my care or under my supervision, or under my guidance, numerous cases of acute anterior poliomyelitis.

Q. Would you say that that ran into hundreds of cases?

A. I should say that it ran into the hundreds.

Q. You have previously testified in the case of Robert A. McAllister against Cosmopolitan Shipping Company, Inc.? A. Yes.

Q. And we have discussed the facts in this case so that you are fairly familiar with them without going into too much detail now? A. More or less, yes, we have discussed them.

1010

Q. Now, this libelant claims to have first felt the onset of poliomyelitis on the 11th of November, 1945.

It also appears by Respondent's Exhibit E, being a clinical record of the U. S. S. Repose, that his malady was first diagnosed as acute anterior poliomyelitis on the 11th of December, 1945, and it also appears without question that this libelant was hospitalized at a United States Marine Corps Hospital at Tsingtao on December 1, 1945, and remained there until December 7, 1945, when he was flown to and hospitalized on the U. S. S. Repose.

I hand you Respondent's Exhibit E and ask you to refer to the history of the case appearing there, and I ask you whether or not in your opinion, if the onset had in fact occurred on November 11, 1945, the malady would have been, in the ordinary course, diagnosed as polio, before the 11th of December, 1945. A. I am sorry I did not get that question.

1011

The Court: Repeat it, please.

(Question read.)

A. My answer would be that any symptoms presenting themselves on November 11th would not be due to poliomyelitis, which was not diagnosed until the 11th of December.

1012

Beverly Chaney—Direct.

Q. Now, will you also please refer to the exhibit, Respondent's Exhibit E, which is before you there, and state whether in your opinion, assuming that the onset of the disease occurred on the 24th of November of 1945, the diagnosis on the 11th of December would be within a normal and usual interval within which the disease usually develops to a point where it may be diagnosed? A. According to this report his symptoms began on November 24, 1945.

1013

If symptoms began on the 24th of November, and were not diagnosed until some three weeks or thereabouts later, it is very late for the appearance of polio to manifest itself.

The usual period of incubation and symptoms is very much less before it is quite obvious what the patient is suffering from. As a rule from three to seven days—sometimes ten days to twelve days.

Q. And is that also true in the case of adults? A. It runs from three to fourteen days.

Q. Are you familiar with the so-called Sister Kenny method of treatment of polio? A. I have heard of it and I have seen it demonstrated.

1014

Q. Have you used it yourself? A. No, sir.

Q. In your— A. I have used modified Sister Kenny treatment consisting of warm packs to muscles that are painful, but I cannot say that I have used the so-called Sister Kenny technique as she describes it.

Q. You are familiar with the technique, are you not? A. More or less.

Q. Do you know the purpose of the application of the Sister Kenny method? A. I know what is purported to be the purpose of it.

Q. And what is that?

Mr. Rassner: Well, now, I object to that. The doctor is not qualified. He says he knows it more or

less. I hardly think that that makes him an expert on that treatment.

The Court: I will allow it. Go ahead.

A. It is claimed by the adherents of the Sister Kenny treatment that it cures 80 or 80 odd per cent of acute poliomyelitis.

Q. In your experience does the use of hot moist packs have any effect upon the course of the disease of acute anterior poliomyelitis? A. Not on the course of the pathology of the disease itself in the anterior horn cells of the spinal cord. It may make the patient more comfortable. It may relieve his pain under certain conditions.

1016

Q. But does the relief of pain have any effect upon the course of the disease—the effect of the virus itself on neurons in the anterior horns? A. My experience has been, no.

Q. When in your experience have you thought it proper first to apply the hot, warm, moist pack method to polio patients? That is, at what stage of the disease? A. At the stage which is characterized mostly by pain, and in which the temperature is not too high to use moist packs, where there are painful muscles, particularly in the neck and back muscles which sometimes are relieved by moist applications of heat.

1017

Q. Has it been your experience that an elevated temperature of the patient himself is usually present when spasm is experienced? A. As a rule that is during the febrile period.

Q. Now, it appears in this record that the patient, Mr. McAllister, was permitted to rest in his bunk for a number of days prior to the 1st of December, 1945, when he was evacuated to the U. S. Marine Corps Hospital at Tsingtao. During that period there was no treatment of any kind given to him, except to offer him food and permit him to rest completely.

In your opinion does that method of treating the pa-

1018

Beverly Chaney—Cross.

tient, did that method of treating the patient, have any effect upon the course of the disease and its end results?

A. In my opinion that had no effect on the end results and the chronic effects of the disease.

Q. Have you within the last few days examined the report of the physical examination of this libellant by Dr. McCauley? A. Yes.

1019

Q. As a result of your examination of that report were you able to find any feature in there which indicated any improper treatment or improper lack of treatment in the early stages of the disease? A. I found nothing in that report which indicated negligence or improper treatment of the disease in any of its phases.

Mr. Gray: You may inquire, Mr. Rassner.

Cross Examination by Mr. Rassner:

1020

Q. Dr. Chaney, you have done a lot of work for insurance companies and steamship companies. Can you tell me how many examinations you have made in your life for insurance companies and steamship companies? A. My first examining case was for the Fifth Avenue Coach Company—

Q. That isn't the question, Doctor. I want the number. Is it 10,000, 20,000? A. I am attempting to—I am trying to break it down for you.

Q. Just estimate it. Don't break it down, Doctor. A. I could not answer it. It would be purely a guess. There have been hundreds of them.

Q. Would you say thousands would be more like it? A. In the course of 34 years there may have been a thousand.

Q. Or maybe 10,000? A. No.

Q. In any event, do you recall a single case in which you admitted that the claim by a claimant was true? One case? Can you name it? Where you came to Court and

admitted under oath that the condition of the plaintiff was correct?

Mr. Gray: That is objected to as irrelevant.

Mr. Rassner: I want to show that the doctor never admitted that any plaintiff has ever made an honest claim in his life. He can't name one.

The Witness: Oh, yes. I testified in Queens County Court two or three years ago—

Q. For a defendant? A. For a woman, a plaintiff.

Q. For a plaintiff? A. For a plaintiff.

1022

Q. I didn't ask you that. I said, where you testified for the defendant. One, in your entire life. A. Did I do what?

Q. Admit that the condition of the plaintiff was true.

A. Oh, frequently, yes, very often.

Q. Can you name one? A. I cannot at this moment.

Q. That is all I am asking you. A. If you choose to call me again tomorrow morning I can name plenty of them for you.

Q. You have answered my question.

Now, you testified before me in the case of Robert A. McAllister, who is the plaintiff in this case, in his case against the Cosmopolitan Shipping Company, Inc. A. I did.

1023

Q. When did you read that testimony last? Your testimony? A. About ten days ago.

Q. Is there anything that you want to add to what you said then, in the previous case, that you haven't already testified to today? A. I can think of nothing at the moment which I would care to add.

Q. Do you know anything that is in addition to or different from your testimony today, as compared with your testimony in the previous case? A. I can think of nothing at the moment.

Q. Now, Doctor, may I ask you if you testified in sub-

stance that the end results of polio depend upon the individual's innate resistance to the virus? A. That is correct.

Q. And do you still say that that is so? A. More or less, to some extent, yes.

Q. So that the state of health of an individual is important to the end result of polio? A. The innate immunity of the individual I think has much to do with the course of the disease.

Q. And the end result? A. Yes, sir.

Q. So that if a man is well fed, properly nourished, under the proper environment his chances of recovery are better than those of a man who is completely neglected and not fed properly? A. That is not analogous to the question you just asked me.

Q. Do you agree with that or don't you, Doctor? A. I would say that general hygienic measures should be used. In other words, the nourishment of the patient should be cared for. The general hygienic measures should be taken.

Q. And they are of importance in the end results to the patient? A. More or less, yes.

Q. That answers my question. Now, do you consider any doctor an authority on the question of polio? Any doctor at all? A. No, sir.

Q. Did you ever hear of Dr. Lewin—L-e-w-i-n? A. I don't recall the name at the moment.

Q. Well, I have reference to Dr. Lewin—Dr. Philip Lewin, M.D., F.A.C.S., Associate Professor of Bone and Joint Surgery, Northwestern University Medical School; Professor of Orthopedic Surgery, Cook County Graduate School of Medicine; Attending Orthopedic Surgeon, Cook County and Michael Reese Hospitals; Consulting Orthopedic Surgeon, Municipal Contagious Disease Hospital, Chicago.

That is the man I have reference to.

Now, I ask you if you recall his making this comment in writing:

(Reading) "The importance of diagnosis prior to the

moment at which the virus attacks the nerve cells of the spinal cord cannot be overemphasized. Diagnosis and treatment should be considered in terms of minutes and hours, not days."

Do you agree with that?

A. Only in reference to cases that have respiratory paralysis. Otherwise I would not agree with that.

Q. Therefore you don't agree with it in a case other than one involving the chest? A. That is right—respiratory involvement.

Q. Do you agree with this statement of Dr. Lewin:

"In the presence of the symptoms, signs and physical observations mentioned, a presumptive diagnosis of early acute poliomyelitis may be made; then a lumbar puncture should be performed to aid in establishing the diagnosis."

1028

Do you agree with that? A. In the main, yes.

Q. Do you know Dr. Wright? A. What Wright?

Q. Jesse Wright. A. No.

Q. Did you ever hear of this statement—I am referring to Dr. Jesse Wright of Pittsburgh—you haven't read any of his works? A. No, I can't say that I have. One of my ex residents is from Pittsburgh, named Wright. I do not recall that his first name was Jesse.

Q. Does this refresh your recollection that you have read one of his statements:

1029

"After initial and nursing supervision of the patient with acute infantile paralysis, pain and tension may be relieved considerably in certain types of poliomyelitis by moist heat in the form of fomentations if the packs are prepared properly and applied as tolerated. Then painless guided motion is possible earlier, circulation and tissue tone improved, avoiding the atrophy of muscles and stiffness of joints seen after prolonged rest and restriction."

Do you agree with that?

A. No, sir, I cannot agree with that statement in whole.

Q. Well, let me see if you agree with any part of it. A.

1030

I agree with the part where he says that moist packs may be of relief in pain.

Q. Now, I am particularly referring to — A. May be.

Q. I am particularly referring to Dr. Wright's statement on page 3 of his book where he says, that the atrophy of muscles is avoided by early treatment. Do you agree with that? A. In my opinion I absolutely do not agree with that. I altogether disagree with that.

Q. You differ with that? A. Yes, sir.

1031

Q. I want to use his exact words and ask you if you do or do not agree with this:

"Then painless guided motion is possible earlier, circulation and tissue tone improved, avoiding the atrophy of muscles and stiffness of joints seen after prolonged rest and restriction."

Do you agree with that? A. I do not, no, sir.

Q. Very well. You have answered my question on that. Do you know Dr. Moen Stimson? He testified here on behalf of the respondent. A. I know him casually, yes. You are speaking of the Deputy Commissioner in the Health Department?

1032

Q. Do you agree with his statement that the aims of treatment are to save life, to relieve physical and mental — A. Just a minute. Start over again.

Q. (Reading) "The aims of treatment are to save life, to relieve physical and mental discomfort, to minimize after-effects, and to rehabilitate the patient."

Do you agree with his work where he makes that statement?

Mr. Gray: That is objected to as too general, because when he says "treatment," he doesn't say treatment of what, nor treatment when.

Q. Do you agree with that under any circumstances, Dr. Chaney? A. No.

Mr. Rassner: All right.

Now, getting back to the comment by Dr. Wright about painless guided motion — what is that in a polio case? What is meant by painless guided motion in a polio case? A. I would like to have Dr. Wright say what it might be. I don't know.

Q. Do you know what it is, Doctor? A. I have no idea what painless guided motion is.

Q. All right, that answers my question. A. I presume it is moving a muscle to the point where it causes pain, and then stopping, although I would be taking the words out of Dr. Wright's mouth. I presume that that is what he means, but I don't know. I don't use that term.

1034

Q. Did you ever use that method? A. I don't use that except in my shoulder bursitis which I have now, and gives me pain. I stopped using the pulleys.

Q. Well, I am awfully sorry to hear that, Doctor. I really am, but I am referring to polio cases. A. I did not mean to inject any personal item into the discussion. I mean I am not familiar with that term, and I do not know what he means by it.

Q. Therefore you haven't used that method. A. I should say no.

Q. And therefore you cannot express an opinion as to whether that method is good or bad? A. I have an opinion.

1035

Q. You have never used that method — A. No.

Q. — have you? A. No.

Q. And therefore your opinion would not be based on actual observation by you, would it? A. Not under those circumstances.

Q. Very well. Now, what is meant by "circulation and tissue tone improvement"? A. It means improvement of the circulation in the tissues involved.

Q. Did you ever see — A. Then you go on to say something about preventing atrophy, which is not true. That doesn't happen.

Q. Doctor, I will come to that in a moment. Would early treatment improve circulation in a polio case? A.

Certain conditions of application of heat may temporarily improve local circulation, yes. In other words, putting on moist warm heat may cause vasodilatation, or increase circulation to the muscle.

Q. Then you agree that early treatment may improve circulation? A. It may, locally, to certain muscles involved, where the heat is applied, but not generally.

Q. We are not discussing degree for the moment, Doctor. A. I am.

Q. Generally I am speaking of circulation. A. I am.

1037

Q. Well, these are my questions, Doctor. I beg your pardon. I would like to have a discussion of my questions and only mine. Circulation in a polio patient is improved by early treatment, is it not?

Mr. Gray: That is objected to on the ground that the term "early" should be described as to early with respect to what stage of the disease?

Mr. Rassner: I have no objection. Within the first two weeks.

The Witness: Your question is avoiding the issue, and I cannot answer it.

1038

Q. You cannot answer my question the way I put it? A. Not the way you put it, no.

Q. But you do say that circulation can be improved by treatment? A. I say as I said just a moment ago. In certain areas where the heat—application of moist warm heat—is applied, it may cause vasodilatation and give increased circulation to that particular muscle.

Q. Does that include the muscles of the upper and lower extremities? A. Not unless you had applications on the entire musculature.

Q. Now, suppose you explain to us, Doctor, if you do apply warm, moist heat on the entire musculature, will it under those circumstances improve circulation in the upper and lower extremities? I mean in both arms and both legs?

A. It may for a brief duration, but very short, and then be followed by vasoconstriction and inflammatory —

Q. So it is a matter of time, as far as you are concerned. That is to say, it is a temporary improvement. A. Yes, sir.

Q. Now, Doctor, what is meant by muscle tone? A. It is the degree of contractility of a muscle — of the tone of a muscle.

Q. Is that important in a polio case? A. It is important in so far as the symptoms of the patient are concerned. In other words, if you get increased tension of a muscle you may have more pain.

Q. But nothing — A. But it does not influence the course of the disease — anything you do for it.

1040

— Q. I am not talking about the virus. I am talking about the muscle, and I want to know how it affects the muscle tone. Now, you are evading the question when you are talking about the virus. A. I am not evading any question. I am only too happy to answer any question.

Q. Will you please refrain from commenting on the virus until you are asked about it. I am talking about the muscles and the muscle tone. A. Will you give me the question again?

Q. Now, I will reframe the question if you will bear with me, Doctor. I am not talking about the virus. I am talking about tissue and muscle. I am asking you if early treatment will improve the muscle tone — early treatment within a week or two of the disease — of the onset of the disease. Yes or no. I will take a direct answer. A. Fundamentally no.

1041

Q. Fundamentally no? A. No. It may cause a temporary relaxation of the muscle and temporarily decrease the tension of that muscle, but fundamentally, no. In other words, the muscle is under the control of the anterior horn cells which are involved by the virus — which word you don't like me to use.

Q. No; I don't like you to discuss virus when I am not asking you about it. I will come to that in a moment. When

I am talking about muscle, I don't like you to evade the question — A. I am not evading any question.

Q. — by talking about virus. A. I am not evading any question. I am trying to give you an honest answer to any question you put. If your questions are evasive, then that is a different thing.

Q. Do you know the difference between muscle and virus, Doctor? A. Well, certainly I do.

Q. Is there a difference between a muscle and a virus?

A. Of course there is.

Q. Now I am asking you about muscles and not virus.

A. (Continued) Just as much difference as there is between your head and your foot.

Q. And I hope there is a difference. A. Sometimes there is not.

Q. Well, that is my misfortune. I won't blame you for that. Now, let's get back to the muscles. You have stated that early treatment may tend to relax the muscle. Isn't that so? A. Temporarily.

Q. And during that temporary relaxation that muscle that is relaxed will have no counterpull against another muscle. A. No.

Q. When the muscle is relaxed it will still have a pull?

A. Every muscle has a muscle that works in contrary action, and antagonistic to that muscle.

Q. When it is relaxed how does it act? A. It simply may relax and the other muscle may stay as it is.

Q. Now, suppose you have a spastic muscle as opposed to a relaxed muscle. Is that of any benefit to the patient, to have his muscle relaxed? A. Only in so far as pain is concerned. Otherwise not in the slightest.

Q. Well, I am talking about when the pain is caused by a spasm. Doesn't that have a tendency to tear muscles, especially injured and sick muscles? A. The muscles themselves are not sick. The disease is in the anterior horn cells of the spinal cord, and not in the muscles.

Q. Now I will go back to the virus. The virus destroys the anterior horn cells in part, and damages other anterior horn cells. Isn't that so? A. That is correct.

Q. Now, those that are damaged regenerate or die; isn't that so? A. Some of them, yes.

Q. Is it fair to say and to assume with a reasonable degree of medical certainty that a number of damaged anterior horn cells die, and a number improve? Is that right? A. That is all right.

Q. And the patient's own physical condition has a great influence upon the number of anterior horn cells which die and those which improve? That is, those which have been affected by paralysis? A. That is perfectly natural of course.

1046

Q. Then the answer is yes? A. That is prima facie evidence.

Mr. Rassner: Now, I would like to have that question read back and see whether you want to change your answer from yes to no.

The Witness: No—I don't want to—

Mr. Rassner: Will you bear with me, Doctor? I want to have the question read back just to make certain in my own mind that you have made a yes answer to that question.

1047

Now, may I have that question read back?

(Question read as follows:

"Q. And the patient's own physical condition has a great influence upon the number of anterior horn cells which die and those which improve? That is, those which have been affected by paralysis?")

Mr. Rassner: I meant to say virus there. Pardon me. Change that "paralysis" in that question to "virus."

The Witness: Reread that, will you, please?

(The question referred to was reread by the reporter, changing the final word from "paralysis" to "virus".)

The Witness: You talk about a number of anterior horn cells involved, and some killed.

What is my answer there?

(The preceding three questions and answers were read by the reporter.)

Mr. Rassner: Is that correct, or do you want to change your answer?

The Witness: I want to change my answer.

Mr. Rassner: All right. Suppose we hear how you want to change it.

The Witness: Poliomyelitis is a disease of the anterior horn cells of the spinal cord. It is not the actual disease, or, the pathological process is not influenced by any other factor, such as the general state of health. That is, a person may have a bad heart; he may have tuberculosis; he may have anemia; he may be undernourished; and it does not affect the course of the anterior horn cell involvement, so that to the extent I would like to change my answer, your Honor.

Mr. Rassner: You want to change your answer from yes to no?

The Witness: Yes, sir.

Mr. Rassner: Is that correct?

The Witness: I think that is correct.

Q. Now, so that we understand each other, it is your testimony that the patient's own physical condition does not affect the chances of the patient's own resistance combating the inroads of the virus, and you want to change your answer in which you said that his own physical condition does have an effect to an answer that his own physical condition makes no difference; is that right? A. That is correct. I understand you perfectly.

Q. Now, would you say that a man who has been diagnosed as a polio victim—that it does not make any difference what treatment he gets—nature will just run its

course regardless of the treatment? Is that your testimony? A. With the exception which I have stated before—if it is a respiratory—

Q. That is, respiratory— A. —involvement.

Q. Is that your answer? That the disease will just run its course whether or not he has a doctor? A. That is right.

Q. That is your testimony, isn't it? A. Generally, yes, yes.

Q. And your original statement—I think you made it in the first trial—that the man's own condition has a great influence on the progress of the disease—isn't that true? You want to change that testimony, don't you? A. What did I state before?

1052

Q. Suppose I give you the direct question and the direct answer.

Will you bear with me a moment?

I read to you from your testimony and ask you if you made this statement, on page 467:

(Reading)

"I believe that the end results of polio, that is, the progress of the pathology is determined by the individual's innate immunity toward the virus."

1053

Do you want to change that answer? A. No, sir.

Q. That is true, isn't it, Doctor? A. What?

Q. That is true? What I just read to you. Isn't it? A. I believe it to be true. I am testifying under oath. I am attempting to give honest, competent medical testimony.

Q. So you believe it to be true. You believe everything you say is true. A. I told you so three times, and I will repeat it again.

Q. So if I asked you a fourth time If you believe it to be true your answer would be that everything you say you believe to be true. Is that right? A. It would.

Q. Do you remember your statement that you made in answer to Mr. Gray's question that it is believed that early

1054

Beverly Chaney—Re-direct.

treatment with the Sister Kenny method by those that believe in the Sister Kenny method—that early treatment, the early application of that method, cures upwards of 80 per cent of polio victims? Is that also true? Or do you want to change that testimony? A. What did I say? What was the question and what was my answer?

Q. Don't you recall? A. No.

Q. Well, let me ask you, do you recall making this answer— A. I don't think you recall.

1055

Q. —in substance—well, my memory is not so good. I plead guilty to that charge too.

Let me ask you if you remember answering Mr. Gray, when he was questioning you about the Kenny treatment, that it is claimed—you did not say that she claimed, or who claims—it is claimed that the use of the Sister Kenny treatment in the early stages cures upward of 80 per cent of polio victims. Did you make— A. I might well have said that it is claimed that it cures over 80 per cent. I might have said that it is claimed that it does, but I did not say that I approved or agreed with that.

Q. You haven't used the Kenny method, have you?
A. Modifications of it.

1056

Q. But you haven't used the original Kenny method whereby it is claimed that upwards of 80 per cent of polio victims are absolutely cured if they get early treatment. You have never used that method. A. Generally speaking, no.

Mr. Rassner: No further questions.

Re-direct Examination by Mr. Gray:

Q. Doctor, will you state what effect, if any, the presence of the virus in the anterior horn cells has upon the ultimate atrophy of the muscles involved?

Mr. Rassner: I think he has answered that on direct, your Honor, and I believe he said none. This is repetitious.

The Court: I will let him answer that. Go ahead.

A. Atrophy of the muscles in anterior poliomyelitis is due to the damage done to the anterior horn cells in the spinal cord. In other words, it is not a disease of the muscle itself. It is a disease of that part of the spinal cord—namely, the anterior horn cells.

Q. And what has been your experience as to the extent of the involvement of the muscle and the consequent atrophy with relation to the number of anterior horn cells affected by the virus? In other words, if all of the anterior horn cells are affected is the muscle totally dead, and if only 10 per cent, is the muscle affected to a similar proportion? A. It depends on whether those anterior horn cells are just in a state of congestion or inflammation, or whether they are actually completely killed, and if they are actually completely killed, then there is no return of function to the muscle supplied by that particular anterior horn cell.

1058

Q. But the anterior horn cells that are not completely killed—in your experience do you find that they rehabilitate themselves without any assistance, any medical assistance, from the medical profession? A. Restoration or complete cure takes place, depending upon the degree of damage done to the anterior horn cells, and it is an improvement.

Q. And the vitality of the patient—does that have anything to do with it? A. To some extent. In other words, only remotely does the vitality of the patient have anything to do with it. In other words, as I said a moment ago, whether you have heart disease, or tuberculosis, or a brain tumor, if you develop anterior poliomyelitis I think the chances are no different.

1059

Mr. Gray: That is all. Thank you, Doctor.

Re-cross Examination by Mr. Rassner:

Q. Tell me, Doctor, you made the statement that nature will cure some ill anterior horn cells in a poliomyelitis victim. Now, tell me what scientific method you have that

1060

Beverly Chaney—Re-cross.

has established in any instance that an anterior horn cell was sick as a result of the polio virus, and then it was cured. A. The results of post-mortem and autopsy studies, and results of the various tests on the spinal fluid.

Q. How, Doctor? Just tell me how. Just tell me the technical method you have employed to determine that an anterior horn cell was once sick due to the polio virus. Tell me what method you used to determine that. You made the statement yourself. Now tell me what method you used. A. By the examination of that anterior horn cell under the microscope.

1061

Q. And you can tell whether an anterior horn cell which is perfectly healthy was once ill with the polio virus? A. No, sir. Not one cell. You can't say it was once ill.

Mr. Rassner: All right. No further questions.

Mr. Gray: Thank you, Doctor.

Mr. Rassner: Are you through with this doctor?

Mr. Gray: Yes, sir.

Mr. Rassner: Now I would like to make a further motion.

1062

If the Court please, Dr. Chaney has testified that he has never used the Sister Kenny method, and therefore I move that all his testimony with reference to the Sister Kenny method and its use or failure to use be stricken from the record on the ground that the doctor is not qualified to testify as to the Sister Kenny method and the effect of its use and non-use.

The Court: Motion denied.

(Witness excused.)

Mr. Gray: Dr. Ward, will you please take the stand?

Robert Ward—Direct.

1063

ROBERT WARD, called as a witness on behalf of the respondent, United States of America, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Dr. Ward, are you a physician duly licensed and admitted to practice in the State of New York? A. I am, yes, sir.

Q. Will you please tell us where you received your diplomas, and what diplomas you have received? A. Yale University B.A. in 1930; M.D. in 1933.

1064

Q. And when did you start your activities as a physician? A. In 1933.

Q. And where did you intern, if at all? A. I interned at the New Haven Hospital and then at the John Hopkins Hospital in Baltimore.

Q. Since that time what has been your activity particularly with respect to poliomyelitis?

Mr. Rassner: I will concede the doctor's qualifications as an epidemiologist.

Mr. Gray: I would like to have his qualifications on the record.

1065

A. Well, I have been in the branch of medicine known as pediatrics, which deals with children, and my research interest has been largely in the field of virus diseases, particularly poliomyelitis, since 1940.

Q. With what hospitals are you connected now? A. I am connected with Bellevue Hospital and the University Hospital.

Q. New York University Hospital? A. Yes.

Q. Have you with you a list of various articles on polio which you have authored, or in which you have collaborated for the last several years? A. Yes, sir, I have.

Q. Will you produce it, please? A. (Witness produces papers.)

1066

Robert Ward—Direct.

Q. And within what period does this list apply? That is, what period does this list include? A. 1940 through 1952.

Mr. Gray: I offer it in evidence.

Mr. Rassner: It is objected to.

Mr. Gray: I offer it to support the qualifications of this witness, and to show his knowledge in, and identification with the field of polio.

The Court: What is the objection?

Mr. Rassner: We can't offer articles in evidence that way.

1067

Mr. Gray: I am not offering the articles. I am offering a list of articles which he has written and in which he has collaborated.

Mr. Rassner: I will concede that he is one of the top men in the field. What more do you want?

The Court: Let him identify that.

Mr. Rassner: I withdraw my objection.

The Court: All right.

(The list of articles referred to was marked Respondent's Exhibit L.)

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Mr. Rassner: I will go you one step further, and consent to all his testimony going into evidence, and I will waive cross-examination, unless you want to have him add something to what he said at the last trial.

Mr. Gray: I wish to examine the witness in this way.

Mr. Rassner: All right.

The Court: Very well.

Q. How long, Doctor, have you been engaged in the field of research in the field of poliomyelitis? A. For the last twelve years.

Q. And you are still actively engaged in it? A. Yes, sir.

Q. Now, in this case the libelant, Mr. McAllister, claims that on November 11, 1945, he experienced the following symptoms:

While he was in the Port of Shanghai, in China—and I am taking this from the Bill of Particulars which Mr. McAllister filed in this case, 3-A—stiffness of the neck, blurred vision, weakness, dizziness, difficulty in swallowing, pain in back of neck at the base of the head—and I also advise you that it appears in this record that his malady was not diagnosed as poliomyelitis until the 11th of December, 1945, after he had been hospitalized for 11 days at the United States Marine Corps Hospital at Tsingtao, and on the United States Navy Hospital ship Repose, and I ask you whether in your opinion as an epidemiologist the symptoms which he states he experienced on November 11, 1945, were, or any of them consisted of, the onset of the poliomyelitis which was later diagnosed.

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A. In my opinion some of the symptoms sound very suggestive of poliomyelitis, but the interval of one month is too long in my opinion.

Q. For the disease to develop to a point where it could be diagnosed? A. In other words, the disease should have declared itself in all its classical manifestations long before a month had elapsed.

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Q. I show you Respondent's Exhibit E, being the clinical record of the libelant on the United States Hospital ship Repose, and direct your attention to the history of the disease, and ask you if you can express an opinion with a reasonable degree of medical certainty as to whether the diagnosis of the disease on December 11, 1945, as acute anterior poliomyelitis would be normally related to an onset which occurred on the 24th of November, 1945, as indicated in that history. A. Yes, I do.

Q. As an epidemiologist you don't concern yourself with the treatment of the disease after its inception, or do you? A. No, I do not.

Q. Have you had any experience by observation or

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Robert Ward—Direct.

otherwise as to the effects of the so-called application of the Sister Kenny method to polio patients? A. Well, I could not help but have some literary experience, and also hear the opinions of people that I have been closely associated with.

Q. Do you know Dr. Philip M. Stimson? A. Yes, sir.

Q. Do you know of his work entitled, "Common Contagious Diseases"? A. Yes, sir.

Q. In which he has discussed the course of treatment of anterior horn poliomyelitis? A. I have read it.

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Q. In your opinion is he an authority on the subject? A. Yes.

Q. Now, assuming that prior to the first of December, 1945, while Mr. McAllister was on board this vessel, he was permitted to rest in his bunk at his volition, without being required to perform any duties, and received no other treatment than complete rest. In your opinion would such a method of treatment have any effect on the results of the polio which eventually developed? A. In my opinion it would not.

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Q. Now, Mr. McAllister has testified that at the time he left the ship, on December 1, 1945, after he had remained in bed a number of days, the number of which seems to be in dispute—at the time he left the ship and walked to the ambulance and prior to that time he had suffered no muscular pain or spasm. In your opinion what would that indicate as to whether or not the disease had reached an acute stage? A. The fact that he had suffered no pain in the muscles and no spasm?

Q. Yes, sir. A. What bearing does that have on the stage—

Q. No; I am asking you, can you express an opinion as to the stage of the disease at that time—whether it had reached the acute stage or not? A. What do you mean by the acute stage?

Q. Well, the stage at which treatment would be necessary to relieve pain or to make the patient more com-

fortable. A. Well, he had no pain and no discomfort, so regardless of the stage I don't see the necessity for relieving those things.

Q. Are you familiar with the incidence of poliomyelitis in an epidemic or endemic form in China? A. Well, I have never been to China, but I understand from reading the works of those who have that poliomyelitis is endemic and occurs in sporadic form, but not in epidemic form, in China.

Q. And also what is your opinion as to the practicability of identifying the presence of polio virus in a carrier? A. Well, the practicability of making such an identification today is, I won't say nil, but it is still a very complicated, expensive, and highly specialized test.

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Q. In other words, would it have been practicable, in your opinion, for a number of coolies who were brought on board the vessel to unload her, to have been examined either in a cursory or temporary way, in order to ascertain whether they were carriers of polio or whether or not they actually suffered from the disease? A. No; it would be thoroughly impracticable, because actually in the Orient and in all countries where the disease is endemic the incidence of poliomyelitis, that is, the overt form of the disease, is very low, especially in that age group, in adults, so that the chances of actually observing somebody with the clinical manifestations of polio would be almost nil.

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The Court: What do you think the safest thing to do is?

The Witness: Have no contact with anybody, I suppose.

The Court: Do you know how long that virus will live?

The Witness: Well, it depends on where the virus is.

The Court: I mean have you made a study of it?

The Witness: Yes.

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Robert Ward—Direct.

The Court: Say a man had it, and he was drinking coffee, or something of that kind, and he leaves it on the coffee cup.

The Witness: Your question relates to how long may the virus survive outside the body?

The Court: That is right.

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The Witness: Well, we know that the virus may survive at room temperature for as long as three days, and perhaps longer. It survives in the ice-box for as long as three weeks in the dried state. Now, when it is incorporated in such things as milk or butter, and perhaps other foodstuffs, it may survive for considerably longer periods—80 or 90 days—on that order.

The Court: And while it is there it is a danger, isn't it?

The Witness: Well, it is a potential danger, yes.

The Court: A potential danger?

The Witness: Yes. Yes, sir.

The Court: All right.

1080

Q. And is there any practical means of testing foodstuffs and eating utensils to ascertain whether or not they are contaminated with the virus? A. No; there is no practical means. There is no culture that you can make today similar to the cultures for ordinary germs, such as streptococcus and other germs.

Q. Now, is there any unknown factor involved in the contraction of the disease of poliomyelitis, such as the so-called host factor? A. Well, we feel that that is a very important factor. In other words, during an epidemic in this country, and in other countries where epidemics occur, for every paralyzed case we have reason to believe that there may be between 50 and 100 or perhaps more cases which show no paralysis, but which are actually infected with the virus, and equally or perhaps even more so capable of disseminating the virus. In other words, these are the dangerous spreaders of the virus.

Now, what makes a paralytic case in one man and a non-paralytic, or an abortive case in 99 others—we simply have no clue to that.

I will modify that by saying that there are one or two factors that are known today which may convert a non-paralytic to a paralytic case, such as an operation on the tonsils and adenoids, or an injection of material such as vaccine into the muscles, or even strenuous exercise has been known to influence the course of the disease and convert a non-paralytic into a paralytic case, but other than those factors we really are in the dark as to why one individual should be a paralytic and most of the others not paralytic.

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Q. Now, one of the witnesses in this case, a doctor, has already testified as follows, on page 148 of the record—

(Reading) "As far back as 1909 it was one of the great discoveries, and it was an American discovery—they isolated the virus of polio. It was one of the biggest discoveries we ever had, and yet it hasn't done us any good from 1909 until today."

The witness also testified that, "We can get you a test tube, and you can look at it and see the germ there, but that doesn't help yet."

Will you please state what your experience, or what your knowledge and experience, are with respect to the visibility and the extent of the increase of medical knowledge with respect to the virus since 1909? A. I would like to take up the second part of the question first and say that it is true—I think perhaps what the individual meant to imply was that there was a long period from the discovery of the virus in 1909 by Drs. Landsteiner and Palmer until the last eight years perhaps when the research was relatively fruitless, but it certainly laid the groundwork for most important developments which have taken place during the last ten or fourteen years, and we now are within striking distance, you might say, of a possible solution to this disease, and I speak now of the very real possibility

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of the development of a vaccine which may ultimately be effective in preventing epidemics.

Now, none of that work could have been possible without the original discovery of the virus in 1909.

1085 Q. Can the virus itself be seen in an electronic microscope? A. Well, there is a good deal of argument about that. I have had no direct experience with it, but my close friend and former associate, Dr. Joseph Melnick, at Yale, has had enormous experience in it, and he tells me that despite the work and claims of other scientists who claim to have seen the virus, that he is not satisfied that he has seen it.

On the other hand it really makes very little difference whether you can see it or not. You still know it by its properties—what it does in experimental animals, tissue culture, and things like that.

Seeing the virus, in other words, is not going to produce the answer to the disease.

Q. And what can you say as to the facility or difficulty of diagnosing poliomyelitis in adults? I would like you to restrict your answer to anterior horn poliomyelitis, and not the respiratory type. A. I am not sure that I get your question, Mr. Gray.

1086 Q. Well is it easy or hard to diagnose poliomyelitis in an adult, or must you wait for a considerable length of time for the disease to develop to a recognizable stage? A. Well, in my opinion it may be quite difficult to reach a diagnosis in an adult, especially during the early part of the illness when the symptoms are indefinite, and there is nothing of the classical type of illness that we see so commonly in children to make the physician think of poliomyelitis.

That is another thing too. I mean the name of the disease is infantile paralysis, and when you are confronted with an adult it is usually a physician of particular diagnostic acumen who has the wit to think of poliomyelitis.

Q. That is, as indicated by the type of symptoms that

an adult ordinarily exhibits? A. That is right. Now, I don't mean to imply that that is always the case. Of course you have classical examples where there is little or no difficulty in reaching a diagnosis after two, three, or four days, but on the other hand in a fair number of other adults the initial phase of the disease can be a long drawn-out and rather indefinite affair.

Q. And that might extend for a period of 14 days? As much as that? A. I suppose the upper limits might be around 14 days. Most of them declare themselves within 7 or 10 days, but it could be 14 days.

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Q. Now, what is the value of a spinal tap in the diagnosis of suspicious polio? A. Well, the value of a spinal tap is simply this. In the presence of an epidemic the spinal fluid, in a case of poliomyelitis, should reveal an increased number of cells.

Q. Of what type? A. Well, first they are what we call polymorphonuclear leukocytes, and then very frequently those cells are replaced by lymphocytes, and then, too, there is an increase in the amount of protein in the spinal fluid. This may develop a few days after the increase in the cells has been observed.

The point I want to make, though, is that—if it is important—that this is a non-specific finding. There are other diseases, other infections of the central nervous system, that give you exactly the same picture in the spinal fluid. In an epidemic, however, if a patient with suspicious signs has those changes that I speak of, then it would be strong presumptive evidence that the patient had polio.

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Q. But it would not be an exclusive test, nor an absolute test of the existence of polio? A. That is correct.

Mr. Rassner: That is objected to. The answer has already been given.

The Court: He has answered it. He said that is correct.

Mr. Rassner: All right.

Mr. Gray: You may examine, Mr. Rassner.

1090

Robert Ward—Cross.

Cross Examination by Mr. Rassner:

Q. Dr. Ward, you have read your testimony within the last two or three days, haven't you? The testimony that you gave at the previous trial? A. Several weeks ago, Mr. Rassner.

Q. And there is nothing that you want to change from your previous testimony, is there? A. Well, nothing that I can recall at the moment.

Q. Nothing of any moment? A. No.

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Q. You have told us substantially today what you told us when you testified the first time, and you told us substantially, the first time, what you have testified to today. Is that right? A. I think so.

Q. Now, Doctor, I think we can save a great deal of time, and if Mr. Gray won't object to my unorthodox method of procedure, I would like to read into the record certain testimony. You stop me if I make any error that you think of, or if you want to change any testimony. Otherwise I can read it through, and I think I can get you off in ten minutes, if you will cooperate with me. A. Splendid.

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The Court: Any objection?

Mr. Gray: I would like to hear what he wants to read.

Mr. Rassner: Oh, certainly. Of course, I will go right along.

The Court: All right.

Mr. Rassner: I am reading from folio 1292, the last paragraph:

(Reading):

"Q. And what are your conclusions, your general conclusions, as to the possibility of tracing the infection of poliomyelitis from carriers and from other sources of possible infection? A. Well, all I can say, perhaps, is to re-

iterate that we do not know how it is spread, but I will try and give you some of the facts that we do know now.

"One is that there is good reason to believe that the virus gets in by way of the alimentary tract.

"Q. In food? A. By the mouth, in other words, and it then penetrates the tissues of the mouth or the throat, or of the lower alimentary tract, the intestines, and proceeds thence to the spinal cord or the brain.

"Now I won't go into the reasons for that statement, but the evidence is pretty good, and it is a pretty generally accepted one now amongst the various students of this disease.

1094

"Now how is the virus eliminated?"

That should be a question, I believe.

Mr. Gray: No, it shouldn't; it is part of his answer.

Mr. Rassner: Oh, that is not a question?

Mr. Gray. That is a rhetorical question.

Mr. Rassner: Oh, that is a rhetorical question.

All right. I will continue.

(Reading):

"Now how is the virus eliminated? Chiefly it appears to be eliminated by way of the intestinal tract. It comes out in the bowel movements and it may persist in the bowel movements for as long as 12 weeks. The record is 123 days actually, that virus was recovered from the stool after the start of infection."

1095

That is 123 days after the start of an infection; is that correct, Dr. Ward?

The Witness: Yes.

Mr. Rassner: All right, I will continue.

(Reading):

"It also may be eliminated in material from the mouth, which probably is caught, spread the way a respiratory

disease, such as measles, influenza, the common cold and pneumonia is spread.

"We do not feel that there is very good ground for believing that it is a droplet infection.

"The Court: What kind of infection?

"The Witness: A droplet infection, the way of a common cold or diphtheria or pneumonia.

1097 "A. (Continuing) Now where is it found outside the human body? It is found in sewage. It may be in sewage during an epidemic, but it has not been found in sewage between epidemic periods. Its presence in sewage does not mean that the virus, that the infection is acquired by way of water. There is no good evidence that the disease is water-borne. The virus has been found in flies trapped in nature at epidemic areas. We don't know what part is played by the fly in spreading the disease, however, but it seems like perhaps a dangerous place for virus to be.

1098 "Virus has also been recovered from food contaminated by flies at an epidemic. Such food was tested by feeding to chimpanzees in the laboratory and the chimpanzees showed poliomyelitis infection. So that we know that the fly had a capacity to infect or contaminate material which may be eaten by man, but we do not, as I said, really know what the role of the fly is in the epidemics."

Now I will skip to folio 1301.

(Reading):

"Q. Suppose I withdraw that question and ask you if"—

Mr. Gray: Why don't you read the next question and answer to the witness.

Mr. Rassner: No; I would rather have this.

I was reading from Dr. Stimson's book. That was when I was questioning you about Dr. Stimson's article, and the wording here is—

The Witness: What is that?

Mr. Rassner: The question deals with one of Dr. Stimson's articles.

(Reading):

"Q. Suppose I withdraw that question and ask you if you wrote this article, reading from Dr. Stimson's book, page 369: 'Modes of Transmission.—it seems altogether likely that poliomyelitis is spread in a number of different ways. Direct contact with patient or carrier offers one way, although the precise method or degree of contact necessary, whether by the respiratory or intestinal-oral circuit, has not been clearly defined. The fact that epidemics almost always occur in warm weather has suggested that contact infection may not explain the whole story. When this aforementioned fact is coupled with the evidence for the mouth as a portal of entry, the finding of abundant virus in stools, sewage, flies, fly-contaminated food, a case can be made for the study of poliomyelitis in the light of excremental infections. It should be stressed that at present there is no evidence of poliomyelitis being a water-borne or, except for a few outbreaks, a milk-borne disease. The role played by flies in the transmission of poliomyelitis has not been determined. Although the disease occurs all year round, the concentration of cases during the warm season may be the result of increased dissemination of virus brought about by certain environmental factors not yet understood.'

"Is that right? A. That is right.

"Q. Now is it generally conceded by the medical profession that the disease of poliomyelitis spreads from person to person, either directly or through a carrier? A. Well, in the absence of definitive knowledge I would say that most people probably believe that, yes.

"Q. I mean that is the theory; and I use the word 'theory' advisedly. That is the theory or opinion generally

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1102

Robert Ward—Cross.

accepted by the medical profession, isn't that so? A. I said that, yes.

"Q. And accordingly, the less contact there is between one human being and others, the less proportionate danger of contracting the disease; isn't that so? A. If you accept that theory it would follow.

"Q. Well, that is the major premise? A. Yes.

"Q. My premise follows, doesn't it? A. Yes."

Now, turning to folio 1309, the second question on the page—speaking of Dr. Philip M. Stimson—

1103

(Reading):

"Q. Do you consider him an authority on the subject? A. Oh, yes.

"Q. Do you agree with this statement by him in his article—I will read it to you and ask you if you agree with it:

" 'Many of the diagnoses are easily made by any doctor. Although no symptom, sign or test proves the diagnosis there is usually enough circumstantial evidence in headache, fever, vomiting, stiffness in neck, back, hamstrings and other muscles, and also an apparent muscular inability to lead a physician at least to suspect the disease.'"

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Do you agree with that that it is easily made, that the diagnosis is easily made by any doctor? A. 'Suspected,' I believe he said.

"Q. 'Many of the diagnoses are easily made by any doctor.' Do you agree with the article? A. Well, I agree substantially with what you read."

Now, folio 1313, the second question:

(Reading):

"Q. Very well. Do you agree with this part of the article, page 3"—

Mr. Gray: This is the article by Dr. Stimson?

Mr. Rassner: Yes.

(Reading):

" 'In the average spinal case, with involvement of a leg or an arm, the coordination of care becomes a matter of routine, a schedule of rest, relaxation, of proper nursing care and of measures to combat increased muscle tension can be quickly and adequately instituted by any doctor at all familiar with the infection.'

"Do you agree with? A. Yes, that is a fair statement."

Continuing from folio 1319—reading from the same book—

(Reading):

"Q. Do you agree with this page 6:

" 'When poliomyelitis has struck, three great responsibilities in the matter of education belong to the pediatrician. Inasmuch as there is pretty general agreement that the sooner the poliomyelitis patient is put to rest the better his prognosis. It is highly important, particularly in the presence of the disease, that parents be educated to put to bed at once any person who has acute illness, no matter how trivial. An apparent attack of indigestion, a head cold, or mere fever and headache may be an oncoming poliomyelitis. Many illustrations may be quoted of such patients who try to continue normal activities and then develop serious, even fatal, cases of this malady. In the second place, parents need to be taught the nature of the disease, and the aims of physiotherapy so that they can better cooperate in the treatment of muscle tightness and the re-education of muscle function.'

Do you agree with that? A. Yes, sir."

Now I would like you to tell me now whether there is any difference in the study and comments in relation to infants than it would be to adults, or does it not apply with equal force to both?

The Witness: I should say that it applies with equal force—

Mr. Rassner: Thank you.

The Witness: I should say that it applies with equal force to both.

Mr. Rassner: Thank you.

The Witness: I would like to make a comment—

Mr. Rassner: I would rather that you didn't, Doctor. I would like to get through. You have answered my question.

Mr. Gray: I think the witness should be permitted to qualify his answer if he wants to do so.

1109

Mr. Rassner: Do you want to qualify your answer? Because I would rather that you did not go into any extraneous matters. You don't want to qualify that particular answer, do you, that it applies to both with equal force?

The Witness: I would like to point out that that all applies to a physician's management of the cases, not a pharmacist's mate's, and not the captain of a boat.

Mr. Rassner: Well, then is it your testimony that the care of a patient who is suspected of having any kind of undiagnosed involvement of the central nervous system requires the immediate and prompt attention of a doctor?

1110

Mr. Gray: I object to that because the witness does not purport to be an expert on diseases of the central nervous system.

Mr. Rassner: Can you answer that particular question with a reasonable degree of medical certainty, Doctor, or can't you?

The Witness: Surely.

Mr. Rassner: I happen to think that the Doctor is perfectly qualified to answer that, but I would like to have the Doctor be the judge of that.

May I have the question read?

And first tell me if you feel qualified on the basis of your experience to answer the question, and give us the benefit of your thought in any way you like, and give us any explanation you like.

May I have the question read?

(Question referred to read by the Reporter as follows:

“Q. Now, I would like you to tell me now whether there is any difference in the study and comments in relation to infants than it would be to adults, or does it not apply with equal force to both?”)

The Witness: Yes, obviously.

Mr. Rassner: Now, continuing from folio 1324, or 1323, rather.

1112

(Reading):

“Q. Now, Doctor, I would like to read something from this publication by the National Foundation for Infantile Paralysis, Inc., Franklin D. Roosevelt, Founder, publication No. 34, page 6, and ask you if you agree with this:

“ ‘Keep close watch during epidemics.

“ ‘There is nothing typical or diagnostic of infantile paralysis in these symptoms. Most of them may be found in the early stages of a number of communicable diseases. But when poliomyelitis is known to be present in the community, or when a person is known to have been exposed either to a victim of the disease or someone who has been in contact with him, these signs and symptoms assume greater significance. They call for the immediate attention of the physician.’ ”

1113

Do you agree with that? A. Yes, I agree.

“Q. Now, reading from page 7:

“ ‘The spinal cord is the seat of sickness.

“ ‘Infantile paralysis is not primarily a disease of the muscles but rather of the spinal cord and the central nervous system. The damage is seldom uniform or symmetrical. If the nerve cells in the spinal cord are made but slightly ill or only a few destroyed, then, with proper treatment, there will be only a minor form of temporary muscle weakness.’ ”

Do you agree with that? A. Yes, I agree with that.

"Q. Now, reading from page 9:

" 'Means of spread from person to person

1115

" 'Many theories have been advanced as to the manner in which the virus spreads from person to person. There may be several methods of spread. The virus is eliminated from the body of the patient and the carrier with the discharges from the throat and especially from the bowel. Personal contact, droplets thrown into the air by coughing, sneezing or talking; food, milk or other substances soiled with human excretions may spread the virus to a new patient. It is not known how active a role insects play in the spread of the disease, but flies trapped in epidemic areas have been shown to carry the virus.

" 'While all the details of the method of spread have not as yet been determined, any method of allowing infected material to be carried from the source of disease (that is, the bodily discharges of a sick patient or a healthy carrier) to the nose or throat or intestinal tract of some other person may apparently cause new cases of infantile paralysis.' "

Do you agree with that? A. Substantially, yes.

1116

"Q. 'Incubation period.

" 'The time elapsing between entrance of the virus into the body and the development of the first symptoms is the incubation period. In infantile paralysis this seems to be relatively short. In some outbreaks it has been as short as four or five days; in other cases the incubation period may be as long as ten days or two weeks.' "

Do you agree with that? A. No, I would widen the limits of the incubation period. We feel that it may be as long as 30 or 35 days.

"Q. Do you agree with this on page 10:

" 'During an epidemic many carriers and persons with the mild undiagnosable forms of poliomyelitis infection unintentionally and unknowingly spread the virus.

“ ‘There is no practical way to detect these carriers. All that can be done is to prevent unnecessary contact with others.’ ”

Do you agree with that? A. Yes, sir.

“Q. Do you agree with this sentence, foot of page 10:

“ ‘Since this disease comes from other infected persons, the less the number of contacts the less the chance of being infected.’ ”

Do you agree with that? A. Yes, sir.”

Reading from folio 1331—

Mr. Gray: Wait a minute.

1118

Mr. Rassner: Wait a minute what?

Mr. Gray: There is still something more to the answer.

Mr. Rassner: He has answered my question. He has answered “Yes, sir.” And I would rather just not read the rest of that. You can read it later.

Mr. Gray: I insist that the last part of the answer be given, or that the whole question and answer be excluded.

Mr. Rassner: Well, I will read it to save time. Let me read the question.

(Reading):

1119

“Q. Do you agree with this sentence, foot of page 10:

“ ‘Since this disease comes from other infected persons, the less the number of contacts the less the chance of being infected.’ ”

Do you agree with that? A. Yes, sir. It might be pointed out, if I may make a statement—

“Q. I think you have answered the question.

“The Court: Let him point it out.

A. (Continuing) It might be observed that most of these statements refer to contact of individuals during an epidemic.”

That is all there is.

Mr. Gray: That is all.

Mr. Rassner. I don't know what it means.

Mr. Gray: You have read it. You haven't proved it.

(Continuing to read):

"Q. Do you agree with this, page 12:

" 'Call your doctor.

1121 " 'In spite of the fact that there is no specific form of treatment, much can be done and should be done by the physician for the patient with infantile paralysis. On the appearance of the very first suspicious symptoms of the disease a physician should be called. His advice should be followed throughout the course of the disease, during both the acute stage and the periods following. The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result.'
Do you agree with that?'"

You did not quite answer there, but I think you did answer it later on.

Folio 1333—

1122 Well, let me ask you now, do you agree with that statement, Doctor?

Let me read it to you and ask you if you agree with it.

I am reading from page 12 of this book put out by the Institute, or National Foundation for Infantile Paralysis.

The Witness: Yes.

(Reading):

" 'Call your doctor.' "

Do you agree with that part of it? That in a suspicious case the Doctor should be called immediately?

The Witness: Yes.

Mr. Gray: I think you ought to state what a suspicious case is, and give us the symptoms.

Mr. Rassner: I will be glad to.

In a case where a man has a stiff neck, has a loss of appetite, has a general feeling of weakness, has difficult muscle coordination—would you call that a suspicious case regardless of what disease it might be, and that he should have a doctor under those circumstances?

The Witness: It is suspicious of an illness of some kind.

Mr. Rassner: That requires a doctor?

1124

The Witness: If a doctor is available it would certainly be nice to have one.

Mr. Rassner: Well, would good practice indicate that a doctor should be called under those circumstances, or procured, if possible?

The Witness: Good legal practice?

Mr. Rassner: No. Good medical practice.

The Witness: I don't get you.

Mr. Rassner: Would you advise the calling of a doctor to attend the patient?

The Witness: I am a doctor.

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Mr. Rassner: I am asking you, if the matter was given to you, to express an opinion as to what would be good practice for a lay person to follow if those symptoms manifested themselves, would it be, in your opinion, good practice for a lay person, such as a master or a purser having some little knowledge of first aid, when he sees a patient, a seaman, an engineer, to be specific, who has a stiff neck, loss of his appetite, who feels weak, and who is having difficulty in muscle coordination, would you say it would be good practice for him, under those circumstances, to let the patient lie in his bunk for a week or ten days, or should he call a doctor, or try and get him to a doctor?

The Witness: Well, I think that under those circumstances it would be of course, a good idea to have medical advice.

Mr. Rassner: You have answered my question.

Now, do you agree with this—I am reading from page 12 of the pamphlet put out by the National Foundation for Infantile Paralysis—

(Reading):

“ ‘Call your doctor.

“ ‘In spite of the fact that there is no specific form of treatment, much can be done and should be done by the physician for the patient with infantile paralysis. On the appearance of the very first suspicious symptoms of the disease a physician should be called. His advice should be followed throughout the course of the disease, during both the acute stage and the periods following. The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result.’ ”

Do you or do you not agree with that?

The Witness: I think it is highly debatable.

Mr. Rassner: And do you have an opinion, one way or another, or would you rather not express an opinion?

The Witness: Well, my opinion is very similar to that expressed by Dr. Chaney and Dr. Stimson.

Mr. Rassner: How about the opinion expressed by the doctor who wrote the article for the National Foundation for Infantile Paralysis?

Are they completely wrong, and is Dr. Chaney completely right, because they are clearly at variance?

The Witness: I think the Doctor can do a lot in certain stages of the disease. I doubt that he can—

Mr. Rassner: He says during both the acute, and the entire progress. Let me read it. Not certain stages.

(Reading):

"The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result." And he refers to "during both the acute stage and the periods following."

Do you or do you not agree with that?

The Witness: I disagree, and particularly in this case.

1130

Mr. Rassner: All right, you have answered my question. You said you disagree.

The Witness: I said I disagree in this particular case because the doctor who was finally called in in this case, whoever he was, was unable to diagnose it, and a diagnosis was not reached until December 11th, which was 18 days after the onset of the illness.

Mr. Rassner: Let's see if we can break it down.

The Witness: (Continuing) So if you had a doctor even on the very first day of the illness, presumably if he could not diagnose it on the 18th day, how could he diagnose it on the first day?

1131

Mr. Rassner: What is so difficult about diagnosing a case of polio when you know that there is polio in the area, when you see that a man has a stiff neck, when you see that the man has a loss of appetite, when you find that the man is weak, and paralysis is starting in? What is so difficult about that?

Can you honestly sit there and say that it is difficult to diagnose it as a case of polio—for any doctor, with any intelligence?

The Witness: Yes, I think it might be extremely difficult, because you don't know—

1132

Robert Ward—Cross.

Mr. Rassner: Would you have any difficulty in that?

The Witness: (Continuing) Because you don't know that there is polio in the area.

Mr. Rassner: What?

The Witness: In 1945.

Mr. Rassner: Wait a minute.

Mr. Gray: I object.

Mr. Rassner: Just a minute.

1133

You said you did not know that there was polio in the area. That wasn't the hypothetical question I gave you, so you had no right to assume a different question. Take my question, please, Dr. Ward.

The Witness: Yes, sir.

Mr. Rassner: Assume that there is polio there, and don't make a different assumption.

Mr. Gray: I think the question should also include that polio was there and that it is known to be there by the person who is to make the diagnosis.

Mr. Rassner: Thank you. Yes. Very good.

Doctor, polio is there and known to be in the area.

The Witness: By whom was it known to be there?

1134

Mr. Rassner: By everybody. By the man who examined the patient.

The Witness: In 1945—

Mr. Rassner: Never mind the date. The time when he made—

The Witness: In 1945?

Mr. Rassner: Regardless of the date.

The Witness: No; that date has an important bearing.

Mr. Gray: I object—

Mr. Rassner: When he made it he knew that there was polio in the area.

The Witness: How do you know that he knew that there was polio in the area?

Mr. Rassner: Assume, Doctor, that a person in the capacity of a purser aboard a ship knows that polio is in the area, that there is an epidemic of polio in the area—

The Court: He put a sign up.

Mr. Rassner: What is that, your Honor?

The Court: He put a sign upon the ship.

Mr. Rassner: He put a sign up on the ship. The master put a sign up—a notice.

Mr. Gray: Not that there was an epidemic.

The Court: No, but that there was polio ashore.

Mr. Rassner: That there was polio ashore.

1136

Mr. Gray: That there might be polio ashore.

Mr. Rassner: No. The word "might" wasn't in that notice, Mr. Gray.

The Court: All right. Don't you think you have spent quite a lot of time on medical testimony here?

Mr. Rassner: Yes, your Honor. I plead guilty.

The Court: It is very interesting but—

Mr. Rassner: May I offer in evidence the entire cross-examination, and their entire direct examination, of Dr. Ward, as given in the previous trial?

Mr. Gray: I object to that as improper cross-examination.

1137

Mr. Rassner: All right.

The Court: Very well.

Mr. Rassner: Do you see what I mean, Judge?

The Court: Let's get along here.

Mr. Rassner: All right, I will try and read it fast.

I am continuing to read under the previous stipulation.

(Reading): —folio 1331—

"Q. Do you agree with this, page 12:

" 'Call your doctor.

" 'In spite of the fact that there is no specific' "—

1138

Robert Ward—Cross.

Mr. Gray: I object to that, your Honor. This is the third time he has repeated the same question.

Mr. Rassner: All right, I will skip that.

Folio 1333. (Reading):

1139

"Q. Under some circumstances he can do very little? Now what are those some circumstances? A. Well, as Dr. Stimson has said this morning, we really have no specific treatment as far as preventing the effects of the virus and the working on the nerve cell, the spinal cord. The course seems to go on regardless of what is done.

"Q. Then you don't agree with this, that the effects—that the physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is the common result? A. I think under other circumstances the doctor can do much."

Now, from folio 1338:

(Reading):

"Q. All right, that is an answer. You should doubt it.

"We will take page 13 now and ask you if you agree with this:

1140

"The use of splints, frames and plaster casts in the routine care of the early case of infantile paralysis has been largely replaced by a method of treatment popularized by Miss Elizabeth Kenny, a nurse from Australia.' "

Mr. Gray: I object to this on the ground that I have not qualified the witness to testify as an expert on the treatment of the disease.

Mr. Rassner: All right, I will ask the Doctor—

The Court: You are reading so rapidly, I don't know whether he followed you. I could not follow you at all.

Mr. Rassner: Question withdrawn.

Doctor, do you agree with this:

(Reading):

“ ‘The use of splints, frames and plaster casts in the routine care of the early case of infantile paralysis has been largely replaced by a method of treatment popularized by Miss Elizabeth Kenny, a nurse from Australia. Miss Kenny has pointed out that the pain and some of the loss of muscle power in the early stages of the diseases are related to spasm and the marked increased irritability of muscles. Without attempting to describe this form of treatment it can be said that it appears to have many advantages over rigid and prolonged immobilization which was widely used previously in the care of the infantile paralysis patients.

1142

“ ‘The Kenny method of treatment, to be of the greatest benefit, should be applied from the very first days of the illness. As soon as the diagnosis is made the patient should be treated by hot packs, which are an important part of the care. These can be administered best by those who have had some special instruction. Hospitalization for all early cases of infantile paralysis is strongly recommended.’ ”

Do you agree with that?

The Witness: No.

Mr. Rassner: Didn't you say yes on your previous testimony?

1143

The Witness: I have the right to change it now.

Mr. Rassner: But you remember saying yes the last time that question was asked you?

The Witness: No, I don't.

Mr. Rassner: Well, then let me refresh your recollection.

(Reading):

“Do you agree with that? A. Yes.”

Was that your testimony at the last trial?

The Witness: It must have been if you are reading it.

Mr. Rassner: Mr. Gray, do you concede that the

1144

Robert Ward—Cross.

last time I asked him that question his answer was yes?

Mr. Gray: At the former trial, I do.

Mr. Rassner: And now you want to change your answer and say no; is that right?

Mr. Gray: He has a right to—

Mr. Rassner: I am not arguing with you, Mr. Gray.

Mr. Gray: I object to your—

1145

Mr. Rassner: Is my question improper? Are you objecting to my question?

Mr. Gray: I am objecting to your cutting the witness off.

Mr. Rassner: I am asking the witness if he wants to change his testimony now from the yes answer that he gave at the previous trial, to this very question, to a no answer now.

Mr. Gray: He doesn't have to change it to a no answer. He can change it to an answer based on the development of medical science in the last five years.

Mr. Rassner: I am asking the witness if he wants to change his answer to no.

1146

The Court: Why not let the witness testify? Go ahead.

Mr. Rassner: Do you want to change it to No?

The Witness: Yes, sir.

Mr. Rassner: Is that what you want to say?

The Witness: I would like to change it to a no.

The Court: Do you care to make any statement with reference to it?

The Witness: Well, I would like to say that there is no evidence that I know of which shows that the Kenny treatment, either in her original treatment, or the modified Kenny treatment which is practiced by many of the people in this country—there is no evidence to show that the ultimate results in terms of degree of paralysis are influenced by the

Kenny treatment. Now, no such study has been carried out that I know of—no controlled study to get the answer as to the influence of the Kenny treatment, but so far as I know there is no good scientific evidence that the Kenny treatment in any way alters the outcome of the disease. I grant you that it may relieve pain.

Q. And that is the basis of your changing your testimony given under oath wherein you said yes at the previous trial, to no, now, similarly under oath? And that is the basis for your reason for changing your testimony? Isn't that so? A. Well, I was asked if I had anything further to say by the Judge, and that is the—

1148

Q. Is that the only reason for your changing your testimony from agreeing with this statement in the previous trial, and completely differing with the statement at this trial? Is there any other reason you want to advance for changing your sworn testimony?

The Court: Well, you have had a lot of time since then, haven't you, to see things and talk about things, and you have changed your opinion?

The Witness: Well, that is partly true. The question was an awfully long one, though, and there may be details in there that I would like to add.

1149

The Court: Why do you spend so much time on the Kenny treatment at this time?

Mr. Rassner: That is a part of our cause of action. We claim that if they had instituted the Kenny treatment right away—it is recognized now as the treatment, and it has been for many years—

The Court: Well, I would say that we have enough about it on the record.

Mr. Rassner: All right, I won't press it.

1150

Robert Ward—Cross.

Q. Do you agree with this statement—quoting from the same article:

(Reading):

“ ‘Improvement may go on and on.

“ ‘The whole course of acute infection, rest in bed, physical therapy and surgery may cover many months. Improvement may continue to take place even for years. Experience has taught that maximum improvement occurs when expert care is administered from the very beginning.

1151 Not for one moment does the parent or the patient dare relax in this supervision and care.’ ”

Do you agree with that? A. Well, I understand that improvement may go on for about 18 months.

Q. No—it says “even for years.” I want to know if you agree with the article as I have read it, or do you change your opinion as to that also? A. Well, I suppose I agree with it substantially.

Q. Well, your answer was at that time—the question was “Do you agree with that?” And your answer was “Yes.” Do you remember so testifying? A. No.

1152

Mr. Rassner: Do you concede that he so testified, Mr. Gray?

Mr. Gray: I do, I do.

Q. Does that refresh your recollection? A. No, but I am taking your word for it, Mr. Rassner.

Q. Well, in any event is that substantially true today?
A. I suppose so.

Mr. Rassner: (Reading):

“Q. Of course, it is pretty well agreed that the incubation period is from 7 to 21 days”—

You gave us your opinion as to the incubation period.

You don't agree that it is from 7 to 21 days, but 7 to 14 usually. A. No.

Q. You know that that is what the article says. A. We don't know what the incubation period is.

Q. In any event you don't agree with the article. Your answer was no as to the incubation period.

Mr. Gray: The answer was, "I don't think we know what the incubation period is."

Mr. Rassner: I say the answer there is no. The answer no at the previous trial—is that still your answer, Doctor?

1154

The Witness: Yes.

Mr. Gray: That is not correct, Mr. Rassner. The answer here is, "I don't think we know what the incubation period is."

Mr. Rassner: Doctor, do you remember testifying as follows—

Mr. Gray: What page?

Mr. Rassner: Folio 1342.

(Reading):

"Q. Do you agree with this, page 4:

" 'The incubation period varies from 7 to 21 days with 7 to 14 usually.' "

1155

"Q. Do you agree with that? A. No."

Do you remember my putting that question to you, and your giving that answer? A. No, I don't remember it, but if you say that I said no, I believe it.

Mr. Rassner: Do you agree with this:

(Reading):

" 'The direction of preventive measures in an epidemic area are naturally under the local public health authorities. However, well children are warned against crowded places.' "

1156

Robert Ward—Cross.

Mr. Gray: I object to that. That is immaterial here.

Mr. Rassner: (Reading):

" 'subject to pollution, over-exertion and tonsilectomies. Paralytic patients should be hospitalized if possible, at least screened, and bedding and excreta sterilized. Generally sanitation of the community should be carefully checked, especially sewage disposal and the milk and water supply.' Do you agree with that? A. Yes."

1157

(Continuing from folio 1344):

(Reading):

"Q. Reading from page 5, do you agree with this:

" 'The invasion of the central nervous system occurs as a relatively late manifestation and is now believed to occur by extension along neuronal pathways rather than by vascular, lymphatic, or other humoral methods. Certainly, the work of Fairbrother and Hurst and more recent experiments of Howe and Bodian indicate that the virus is almost entirely neurotropic, infecting the neurons and not the neuroglia, and traveling from one part of the nervous system to another by passage along the axis cylinders.' Do you agree with that? A. I agree with all that except—

1158

"Q. As a matter of fact, Sabin is the man—

"The Court: Let him finish the answer, please.

"Mr. Rassner: He said that he agrees with all of that. That is an answer.

"The Court: Except.

"Mr. Rassner: Except? I am sorry, I didn't hear that.

"A. (Continuing) Except the fact as stated in the beginning of the sentence that the infection in the nervous system may occur late. We feel now that probably when the

patients gets sick, at the very start, the nerve cells are already infected; probably all the nerve cells that are going to be infected are infected then.

"Q. Didn't you say—and correct me if I am wrong—that you studied under Sabin? A. That is right.

"Q. Wasn't that Sabin's conclusion in 1946? A. That the virus travels—

"Q. That I just read, every word that I just read. Isn't that what Sabin said? A. I certainly believe that he subscribes to all of that except possibly the first sentence.

"Q. Didn't he say the first sentence as well as all the rest of it? Look at it. Isn't that taken right from Sabin's work? A. I can't remember all of Sabin's work verbatim.

"Q. All right, I will take your answer. In any event, you don't agree with it? A. I agree, as I said before, with the latter portion of it but not the first sentence.

"Q. Well, let me ask you this, so there is no question as to who said it. Page 6:

"'Sabin feels' and Sabin is the man you studied under, is that right? A. That is right.

"'Q. Sabin feels that up to and including stage three the process is reversible and the neuron may recover, as the damage is still partial, and that only at stage four is the destruction complete, and, therefore, irreversible and no recovery possible. This is the pathological basis for the extensive clinical recoveries from early paralysis so commonly seen.'

"Now, do you agree with Sabin's statement as to that? A. I guess I am forced to.

"Q. You mean you would not like to, but you have to, is that your answer? A. No, I do agree with it.

"Q. All right. A. But I should point out that that is Sabin's theory again.

"Q. That is all I asked you. A. There is good evidence for it. And those changes and reversible changes that he speaks about there can take place spontaneously and probably usually do.

1160

1161

"Q. And probably under good treatment do, isn't that what you mean? A. Can take place spontaneously.

"Q. And good treatment would aid it to take place immediately? A. I have no idea.

"Q. But Sabin says it does, doesn't he? A. Sabin mentions no word about treatment.

"Q. Do you agree with this statement, page 8:

1163 "On the second or third day of febrile illness the clinical signs referable to the central nervous system increase. Sensitivity and spasm are likely to be present in muscles other than those attached to the back. Irritability and apprehensiveness are common, but, on the other hand, if the process is accompanied by a large encephalitic component, drowsiness often approaching stupor may be present. It is not unusual to have a patient who seems to be very drowsy who when aroused becomes alert and apprehensive. Paralysis is likely to occur on the second to fourth day. The paralysis appears first as a weakness of particular muscles which increases in degree and distribution with varying rapidity."

"Do you agree with that? A. Yes.

1164 "Q. Isn't it a fact that if a patient is treated, the effect of the disease is stopped? A. No.

"Q. Very well. Do you agree with this, page 9:

"The patient does not like to be disturbed and is apprehensive of being handled. The spasm and sensitivity vary greatly in extent. The posterior neck, the erectus spini muscles and the hamstrings are almost universally involved to a considerable degree."

"Perhaps before I continue with my question you would be good enough to tell us what the posterior neck is. A. The back of the neck.

"Q. And the erectus spini muscles? A. Those are the muscles that go along the vertebral column, the spine.

"Q. From the neck on down? A. From the neck on down.

"Q. And hamstrings? A. Those are these muscles here, the back of the thigh (indicating).

"Q. Thank you, doctor. A. You are welcome.

"Q. 'The muscles of respiration may be in marked spasm and it is not unusual to observe the respiratory exchange occurring. The paralysis is most variable both in degree and distribution. In a considerable percentage of mild cases none can be recognized clinically whereas practically all the skeletal muscles can be affected in severe cases. The paralysis is likely to be scattered in distribution, although it tends to be regional. The individual muscles are affected in varying extent from weakness which can barely be deducted to complete paralysis without palpable contraction.' Do you agree with that? A. Yes.

1166

"Q. Now, on page 10, do you agree with this:

" 'Following the subsidence of the fever and the regression of the various activities in the nervous system, the disease enters the recovery stage.' "

Mr. Gray: I object to this because there is no evidence in this case that this man had any fever aboard the vessel.

Mr. Rassner: I ask you if you agree with the following, Doctor. I am not reading, presumably, the questions and answers from the record, but I ask you if you agree with this statement in the article that I have been reading from:

1167

(Reading):

" 'Following the subsidence of the fever and the regression of the various activities in the nervous system, the disease enters the recovery stage. The recovery stage can be divided clinically into two periods. First, the sub-acute state when all danger of further paralysis is over but during which the effects of the general inflammatory reaction and the nervous system are still manifest as shown by nerv-

ousness, irritability, tenderness, hyperesthesia, stiffness and spasm in addition to the essential muscle weakness or paralysis. This stage may last from a few days to as long as two months with a gradual fade-out of the non-motor by-products. The second or convalescent stage is reached when purely motor weakness is all that remains. The length of the convalescent stage is still more uncertain and variable. The older estimate of three to five years during which improvement of motor function could be anticipated with recovery of damaged but not destroyed motor nerve cells has been greatly reduced.' "

1169

Do you agree with that?

The Witness: Yes.

Mr. Gray: The answer to that is, "I am really not qualified to say, Mr. Rassner."

Mr. Rassner: I am asking him if he agrees now. The last time he said he wasn't qualified. Today I believe he is qualified.

Do you feel qualified to answer the question, Doctor?

The Witness: Yes.

Mr. Rassner: Then your answer is yes, you agree with that?

1170

The Witness: Yes, I agree with it.

Mr. Rassner: Now, continuing from folio 1359—
(Reading):

"Q. Reading from page 11, do you agree with this, Doctor:

" 'Acute poliomyelitis is easy of early clinical detection during the full-blown epidemics and can often be diagnosed in the pre-paralytic stage and in abortive forms at such times. It is only when definite paralysis has occurred, however, that early epidemic or occasional cases can be diagnosed. Diagnosis in doubtful cases can be'—

That should be "ascertained"—

Mr. Gray: It says, "checked."

Mr. Rassner: That should be "ascertained."
That is a misprint.

(Continuing to read):

"Can be ascertained by lumbar puncture showing a slight increase of pressure, and a clear fluid with moderately increased cell count of mononuclear character."

Is that correct?"

I will be through in about two minutes.

(Continuing to read):

"Mr. Gray: What do you mean by 'checked'?
Stopped or determined? The 'checked' means determined there.

"The Witness: I think he means 'ascertained.'"

"Q. Ascertained. That is right, Doctor. We agree at least on a word. That is exactly what I mean. A. I would agree with the statement too, and I would emphasize that the word 'epidemic' is included in the statement.

"Q. Oh, yes. A. When you have epidemics there is no difficulty in making a diagnosis, as a rule."

That was your answer. Do you want to change your answer? 1173

The Witness: Just emphasize it.

Mr. Rassner: All right.

(Continuing the reading):

"Q. Yes. In any event, let us say one of your patients that is ill, confined to his bed, where there is a suspicion of an involvement of the central nervous system, regardless of what the disease is, wouldn't you consider it good practice to have him checked at a hospital where all modern facilities are available? A. I can't deny that.

"Q. Do you agree with this, page 12:

1174

Robert Ward—Re-direct.

" 'The prognosis is worse in adolescents and in adults than in children under 10 years of age?' A. It seems to be.

"Q. Then how about this on page 13:

" 'If all of the cells remain vital after the destructive phase of the disease has run its course, there is the possibility of a return of normal power in the muscle. Spontaneous improvement in the over-all picture begins in most cases within a few days and in practically all cases within few weeks.'

Do you agree with that? A. Yes.

1175

"Q. Well, then, naturally, the sooner the patient gets the treatment, the better are his chances for a recovery and freedom from crippling after-effects: isn't that so? Isn't that common sense? A. Well, it would seem to follow, but I don't believe the effect of treatment, as I have said before, has large bearing on recovery.

"Q. You mean then it is common sense it should follow, but you have no proof that it does? A. That is right."

Oh, I will skip the balance.

That is all.

Redirect Examination by Mr. Gray:

1176

Q. Doctor, has there been any development in the study and knowledge of poliomyelitis within the last five years? A. I think there has been considerable.

Q. And is your testimony today based upon the information and added knowledge which you have acquired during the last five years on the subject? A. It could not help but be influenced by it.

Q. Now, is dizziness and headache an indication of an affection of the central nervous system? A. It may be.

Mr. Gray: That is all.

Mr. Rassner: No further questions.

The Court: That is all?

Mr. Rassner: Yes, sir.

The Court: Are you through with the Doctor?

Testimony.

1177

Mr. Rassner: Yes, your Honor.

(Witness excused.)

The Court: Both sides rest?

Mr. Rassner: Both sides rest.

Wait a minute. Do you rest, Mr. Gray? Maybe I was talking out of turn.

Mr. Gray: Yes, I rest.

The Court: All right.

Mr. Gray: I have two short motions to make.

I move to strike the testimony of Dr. Frant on the ground that he is not qualified to express the opinions that he did.

1178

The Court: That motion is denied, and I give you an exception.

Mr. Gray: I also move to strike the testimony of Dr. Di Fiore on the ground that he is not qualified to express the opinions which he did.

The Court: Motion denied, and I give you an exception.

Mr. Gray: I also move to dismiss the libel, as the record fails to prove a case against the United States.

The Court: Well, now, as to that, what about that? That is the reason you are here, isn't it?

Mr. Rassner: That is right.

Mr. Gray: I am laying the foundation for—

1179

Mr. Rassner: As to that may I make one motion?

The Court: I think I will reserve decision on that so that I can decide the whole thing at one time.

Mr. Gray: Of course.

Mr. Rassner: May I say this, your Honor: I would like to make a motion to conform the pleadings to the proof.

The Court: Yes.

Any objection to that?

Mr. Gray: No, sir. We always do it in admiralty.

The Court: All right. Motion granted.

Now, you have had pretty nearly daily copy, haven't you?

Mr. Gray: Yes, sir.

Testimony.

1180

The Court: I suggest that you exchange briefs on the 16th of February, and that either side can furnish a reply by the 20th.

Mr. Gray: That is quite all right.

The Court: That is, any time up to 4 o'clock. File in the Clerk's office.

Now, I made it the 20th, which is a short time, because I would really want the main briefs then, and not have you wait until you see what each says, and then come in with a rather long brief. I mean the reply ought to be short, and don't make that your main brief.

1181

Mr. Gray: I don't intend to do it, and I am sure Mr. Rassner doesn't.

Mr. Rassner: Well, if Mr. Gray will agree with me on a two or three-page main brief, and a one-page exchange, I will consent to that.

Mr. Gray: I have a better case than that.

(Discussion off the record.)

The Court: I reserve decision.

(Discussion off the record.)

Mr. Gray: May we substitute a photostatic copy for the original in the case of Respondent's Exhibit H?

Mr. Rassner: No objection.

1182

The Court: No objection. All right.

Mr. Rassner: If the Court please, I would like to make an application on the record.

I would like Mr. Gray to state if he claims that there has been any additional evidence offered on behalf of the respondent other than that which was offered in the *McAllister v. Cosmopolitan Shipping Company* trial—if there has been any changed evidence offered by the respondent—and if he claims that the libelant has failed to offer any different evidence, any less evidence, as to substantially the same proof, or, in other words, that the libelant has failed to offer substantially the same proof in this trial that he offered in the previous trial.

Mr. Gray: The answer is yes.

Testimony.

1183

Mr. Rassner: May I ask that he point it out in the brief, your Honor?

Mr. Gray: Oh, wait a minute—

Mr. Rassner: Just where there has been any change.

Mr. Gray: Wait a minute. I will write my own brief. If he wants to write his—

Mr. Rassner: Here is the point I am making, your Honor. Of course as the law stands now the law of this case is not covered by a decision in a previous case.

The Court: That is right.

Mr. Rassner: Just the contrary. Whereas if it were a retrial of the case the law of the case would have been laid down by the previous decision, but in so far as I have been too dense to observe any change in the testimony, any subtraction on the part of the libelant of the substance, or any addition on the part of the respondent in the substance, I am at a loss as to how to brief the case.

1184

Mr. Gray: I think if he reads his pleadings he will see a departure in the new pleadings from the old—his own pleadings.

Mr. Rassner: I fail to see it.

The Court: I am not going to go into it at this time. You have got to wait and see. You make up your brief. You have charged negligence. You have amended your complaint. There isn't any maintenance and cure here, and there is no *res judicata*. You are here as if you started *de novo* with a suit for negligence.

1185

Mr. Rassner: I wanted to have Mr. Gray state on the record what he claims is different proof, or what he claims is new evidence.

I am asking him to do it. If he doesn't want to, that is his privilege, but I am making the request that he state on the record what he claims is new or different.

Mr. Gray: And Mr. Gray declines.

The Court: And Mr. Gray replied that he would write his own brief.

1186

Testimony.

Mr. Gray: I will say that I refrain, your Honor, from stating it.

The Court: Now, you understand, the dates are: The 16th for exchange and the 20th for the final, and with the final on the 20th, proposed findings of fact.

Mr. Gray: Yes, sir.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

1187

SAMUEL S. STERN,
Official Court Reporter,
U. S. District Court.

1188

Libellant's Exhibit 2.

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[S A M E T I T L E]

Deposition of Bert R. Leavitt, taken on behalf of the respondent, held at 675 Bay Street, Stapleton, Staten Island, N. Y., on Thursday, August 14, 1952, at 5:15 o'clock P. M., pursuant to notice dated August 12, 1952, before Harry Birnbaum, a Notary Public of the State of New York.

APPEARANCES:

1190

BERTRAM DEMBO, Esq. (Jacob Rassner, Esq.), Proctor for Libellant.

FRANK J. PARKER, Esq., United States Attorney (Horace M. Gray, Esq.), Proctor for Respondent.

IT IS STIPULATED AND AGREED that the testimony may be taken by a stenographer, signing, filing and certification being waived; that all objections, except as to the form of the question to be reserved for the trial; and that a copy of the within deposition is to be served upon the proctor for the libellant.

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BERT R. LEAVITT, called as a witness on behalf of the Respondent, having been first duly sworn by the Notary Public, testified as follows:

Direct Examination by Mr. Gray:

Q. What is your full name, please? A. Bert R. Leavitt.

Q. And your address, Mr. Leavitt? A. 675 Bay Street, Stapleton, Staten Island.

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Q. Were you the master of the S/S Edward B. Haines in the fall of 1945? A. I was.

Q. And that vessel made a voyage to Shanghai from New York? A. That's right.

Q. And later went to Tsingtao? A. That's right.

Q. Did you have a second assistant engineer on board named Robert A. McAllister? A. I did.

Q. Did you leave him at the hospital in Tsingtao? A. I did.

1193

Q. At the time that you left him at Tsingtao, did you know what he was suffering with? A. No.

Q. Before he went ashore at Tsingtao, did you know if he was sick or complained of any illness? A. No.

Q. Did you have a chief officer on that voyage named Linartz? A. I did.

Q. Prior to the arrival of the Edward B. Haines at Tsingtao, had Linartz ever told you that McAllister was complaining of feeling ill? A. Not to my recollection.

Q. Did you ever tell Linartz, prior to the arrival of the Haines at Tsingtao, that you were going to get a doctor for McAllister? A. Not that I remember.

Q. You had a purser-pharmacist's mate on board, during that voyage, by the name of Napier? A. That's right.

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Q. Did you and Napier go ashore at Tsingtao after McAllister went to the hospital, to the Army hospital, in order to ascertain his condition? A. We did.

Q. And what was the result of your visit to the hospital? A. Well, the result was only that I couldn't take him back to the ship because I was sailing the next morning.

Q. And what did the doctor tell you? A. He told me I couldn't take him, that's all.

Q. While you were at Shanghai, or on the trip from Shanghai to Taku Bar, did you have any particular sanitation facilities for the Chinese soldiers and truckdrivers? A. Yes.

Q. Can you describe that generally? A. Well, it was like a trough built over the ship's side, and running water was in it.

Q. Can you state whether or not that was the usual method of handling the sanitary needs of troops on board?

Mr. Rassner: That is objected to.

A. As far as I know. I never was on any of the troop carrying ships.

Mr. Rassner: The question is objected to on the ground that the witness is not qualified.

Q. Had you ever carried troops before, on any of your ships? A. No. 1196

Q. Were any arrangements made for preventing these soldiers, the Chinese soldiers, and, also, the truckdrivers, from using the ship's regular toilet facilities? A. Just say that again, please.

Mr. Gray: Will you please read it back to the witness.

(Whereupon, the last question was read to the witness.)

A. Well, no arrangements were made. That was up to the officers, to keep them out of their quarters, that is all. 1197

Q. Did you have any notice posted on board ship warning the members of the crew of the Haines about various diseases that might be contracted ashore? A. Yes

Q. Was that a standing order or was it just put on particularly for the Chinese coast? A. A standing order.

Q. And was that notice on throughout the whole voyage? In other words, when was the notice posted, as soon as you left New York or later on in the voyage? A. It was posted in all the tropical climates down there, Hong Kong, Singapore, and so on.

Q. Did you have any information that there was any polio ashore at Shanghai or at any other Chinese port? A. Well, we were warned that it was all over there.

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Libellant's Exhibit 2.

Q. You were warned it was all over in the tropics?

A. Yes, in China and all through the tropics.

Q. When did you get these warnings and where did the warnings come from?

Mr. Rassner: I object to the form of the question. The captain said that he gave the warnings all through the tropics.

Mr. Gray: No, he said he was warned.

Mr. Rassner: No, he said he gave the warnings all through the tropics.

1199

Let us ask the captain.

Isn't that what you said, Captain?

The Witness: That comes from the Government; that is posted to you in the mail from the Government. The Government ships, puts that out, you know, and you have got to post it up.

By Mr. Gray:

Q. On the bulletin board? A. Yes.

1200

Mr. Rassner: And you said you did, you did post it?

The Witness: Yes, sure.

Mr. Gray: That is all.

Cross Examination by Mr. Rassner:

Q. Captain, how long is it since you have sailed on a ship? A. 1949—I will say 1948, in order to be sure, because I took sick in 1949.

Q. What was the nature of your illness? A. A shock.

Q. And you are not in a position to travel to Manhattan at the present time, are you? A. Well, I wouldn't know. They told my—my first doctor told me not to go anywhere, just to take it very easy.

Q. What is the diagnosis, Captain? A. Well, I will bring it out for you.

Mr. Rassner: Off the record, please.
(Discussion off the record.)

By Mr. Rassner:

Q. Never mind, Captain. A. All right.

Q. Where did you take sick, Captain? A. Right here on the Island.

Q. And was that after you had retired from the sea? 1202
A. Well, I was home on leave. I had not retired, I was home on leave.

Q. And what company were you working for at the time? A. I was working for the Bulk Oil Company.

Q. Did you ever work for the Cosmopolitan Shipping Company, Inc.? A. I did.

Q. In what capacity? A. Master.

Q. How long did you work for them as master? A. I would say five years.

Q. From when to when? A. From 1943 until 1947, 1948, somewhere around there.

Q. When you worked as master of the Edward B. 1203
Haines, did you consider your employer as the Cosmopolitan Shipping Company, Inc.?

Mr. Gray: That is objected to.

Mr. Rassner: I will take the answer.

Q. Did you consider them as your employer? A. Yes.

Q. And did you get all of your orders, with reference to the ship, its sailing, its lading, and its cargo, from the Cosmopolitan Shipping Company, Inc.? A. No.

Q. Whom did you get your orders from? A. The Army gave me orders.

Q. Now, when you were at Shanghai you received orders from the United States Government, to wit, Army per-

sonnel, to take certain persons aboard the ship; is that right? A. Yes, that's right.

Q. And that included Chinese military men; is that correct? A. That is correct.

Q. Can you tell us approximately how many of those military men you had aboard the ship while the vessel was in Shanghai? A. I would say no more than fifty or no less than forty.

Q. You would say between forty and fifty is a fair estimate; is that correct? A. Yes, that is correct.

Q. You had nothing to do with the maintenance of these army soldiers, did you? A. No.

Q. And you had nothing to do with their care or treatment? A. No.

Q. And you had nothing to do with their physical examinations? A. That's right.

Q. And you had nothing to do with providing doctors for them; is that right? A. No, that's right.

Q. You had nothing to do with examining them or having them examined; is that right? A. That's right.

Q. And, therefore, you did nothing with reference to the examination of these military men? A. That's right.

Q. All you did was permit them to come aboard the vessel, in accordance with the instructions which you received from the Army? A. Yes.

Q. Is there anything else you had to do with those men, other than to give them space aboard the ship and transportation? A. Nothing.

Q. That is all you had to do with them? A. That is all.

Q. And you had nothing to do with reference to their state of health or illness, did you? A. No.

Q. That was not any of your orders, either from the Cosmopolitan Shipping Company, Inc. or from the United States Government; is that right? A. That's right.

Q. Or from anybody else? A. Well, as far as I know.

Q. You had no orders? A. No, I had no orders.

Q. I want to make sure that you had no orders from

anybody except to take these men aboard your ship and transport them, in accordance with instructions from the Army. Is that right? A. That's right.

Q. It was no part of your duties, was it, to have these men examined as to whether they were well or sick? A. No.

Q. And, specifically, it was not part of your duty to have these men examined by anybody, any doctor or anybody else, in order to find out whether they were suffering from polio or any other disease, that was not part of your duties, was it? A. It was not part of my duties, it was the Army's, as far as I'm concerned.

1208

Q. Just answer as far as you know. You do not know whose duty it was? A. No.

Q. It wasn't yours? A. That's right.

Q. We are just sticking to what you had to do. It was no part of your duties? A. No.

Q. And you took no steps with respect to that? A. That's right.

Q. Whether those men were suffering with polio or what, you did not know? A. That's right.

Q. And it was no part of your affairs to find out? A. No.

Q. Aside from these Army personnel there were Chinese truckdrivers, civilian employees, that you were told to take aboard the ship; is that right? A. That's right.

1209

Q. And about how many of those were there? A. About 25.

Q. Now, you took these men aboard your ship also under orders from the Army; is that right? A. That's right.

Q. And you had no instructions as to them, other than those instructions which you received as to the Army personnel; is that right? A. That's right.

Q. Is that correct? A. That is correct.

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Libellant's Exhibit 2.

Q. Now, did you also have mechanics? A. Well, the mechanics were with the same bunch.

Q. About how many mechanics were there? A. The same amount, about 25.

Q. And the same would hold true if I put the same questions to you as I put to you about the Army, about the truckdrivers, the answer would be the same with reference to the 25 or so mechanics; is that right? A. I should think so, yes.

1211 Q. Did you have any Chinese cooks come aboard the ship? A. No.

Q. From ashore? A. No.

Q. Do you remember whether you had any replacements of the ship's crew? A. No, I had no replacements.

Q. You do not recall having any replacements? A. No, I didn't have any replacements.

Q. You did not have any? A. That's right.

Q. Your recollection is pretty certain about that? A. That's right.

Q. So that your crew remained about the same? A. That's right.

Q. And your officers remained about the same? A. That's right.

1212 Q. You had no trouble with Bob McAllister, did you? A. No, I never had no trouble with him whatsoever.

Q. As far as you knew, he was courteous? A. Yes.

Q. Obeyed orders? A. Yes; he was all right with me.

Q. You, personally, never had any trouble with him? A. No.

Q. Is that correct? A. That's right.

Q. Did you consider him a courteous, competent, gentlemanly employee? A. Yes, that's right; he was always all right.

Q. Now, if you had been informed that some of these Chinese soldiers or civilians had polio, would you have prevented them from boarding your ship? A. Certainly.

Libellant's Exhibit 2.

1213

Q. You were concerned with the welfare of your men, were you not? A. That's right.

Q. As a matter of fact, you told the men to watch out for venereal disease, as well as polio and other diseases?

A. I did; they were instructed about that.

Q. In fact, you mustered the crew on several occasions yourself, and you warned them? A. I did.

Q. And you warned the heads of several departments; did you not? A. That's right.

Q. And you warned them to be careful for both polio, venereal diseases, and eat in American-maintained establishments, and try to keep away from native establishments; isn't that so? A. I warned them in Shanghai about that, yes.

1214

Q. You went all out to protect your men; did you not? A. That's right.

Q. You made sure that the posted warnings went out to the men by personally directing the personnel of the vessel to muster so that you could tell it to them personally? A. I had put that on the bulletin board.

Q. I say, Captain, that in addition to posting it you also warned them personally? A. That's right.

Q. And you also warned the officers, the heads of departments, to warn their men? A. That's right.

1215

Q. You took every precaution you could to prevent disease from hitting any of your men; is that right? A. That's right.

Q. But you had no control over the Army personnel? A. No.

Q. And you had no control over the civilian employees coming aboard the ship? A. That's right.

Q. And you had no means of stopping them from coming aboard the ship? A. That's right.

Q. You had to obey orders? A. Yes.

Q. And you did obey orders? A. I did. I got it from the Army, you see.

Q. And you obeyed it? A. Yes.

Libellant's Exhibit 2.

1216

Q. It was not any choice on your part with respect to letting these men come aboard the ship; is that right? A. That's right.

Q. Now, at the port of Shanghai, when McAllister took sick, you brought him to a hospital; is that right? A. In Tsingtao.

Q. You brought him to a hospital in Tsingtao? A. Yes.

Q. Is that correct? A. That is correct.

1217 Q. You said you did not recall any conversations about McAllister which you had with any of the officers or other members of the crew; is that correct? You don't recall the specific conversations? A. No.

Q. But you did talk to them? A. Not to my recollection.

Q. Do you say you do not know whether you spoke to them about McAllister or that you do not remember whether you did or not? Which is your right answer? A. I will tell you. I said I didn't know until the pharmacist came to me and told me that he had to go to the hospital.

Q. That McAllister had to go to the hospital? A. Yes.

Q. And that is the first you recall? A. That's right.

Q. As a matter of fact, you had had trouble with men coming down with venereal disease, members of your crew, about a dozen of them, before McAllister; isn't that so?

1218 A. In Tsingtao? Not in Tsingtao.

Q. In Shanghai? A. Yes.

Q. You had your hands full? A. Yes.

Q. You had about 12 sick men on your hands; did you not? A. Yes, at that time.

Q. Isn't that so, Captain? A. Yes, that is so.

Q. And all your time, all your spare time, was devoted to taking care of a dozen sick people? A. Well, the pharmacist's mate.

Q. Including your own time? A. Yes.

Q. You were pitching in personally? A. Yes.

Q. It was too much for the pharmacist's mate, so you volunteered to help, and you did help; isn't that so? A. That's right.

Q. And you were around helping a lot of the sick men?

A. That's right.

Q. So that a great deal of your time was taken up with taking care of the sick men aboard the ship?

Mr. Gray: Where?

Q. Well, you tell us where, Captain. A. It wasn't Shanghai and Hong Kong, it was when we went to Hong Kong.

Q. And since the purser had so much work to do you volunteered to help him? A. Yes, I did.

1220

Q. You knew how to handle first aid matters; did you not? A. Yes.

Q. And you did the best you could with the limited time you had? A. That is right.

Q. And you had men coming down sick one after the other; wasn't that right? A. 15 on one trip.

Q. 15 on that particular trip? A. Yes, sir, that's right, on that particular trip.

Q. Do you know the names of those 15? A. I wouldn't know.

Q. Do you know whether McAllister was one of the men that was sick? A. That is one thing I don't know.

1221

Q. That is what I mean. There were 15 sick men and McAllister may have been one of the sick men reported to you; is that right? A. I wouldn't say that he reported to me—

Q. But I say he may have been one of the 15 men that was sick? A. He could have been.

Q. He could have been? A. That is right.

Q. You have no independent recollection about whether you had a conversation about McAllister or 14 other people? A. That's right.

Mr. Rassner: No further questions.

Re-direct Examination by Mr. Gray:

Q. You are speaking now about taking care of people with venereal disease, are you not? A. That's right.

Q. You do not remember whether McAllister had venereal disease or not? A. I don't remember, no.

Q. This was a War Shipping Administration vessel, was it not? A. It was, yes, sir.

Q. And you do not know whether Cosmopolitan Shipping Co., Inc. paid your salary from their own funds or Government funds, do you? A. That I don't know. I got paid, that is all I know about it. Where it came from, I don't know.

Q. Did you ever see McAllister go ashore with Linartz, the chief officer? A. I never did.

Q. Did you ever know that any of the passengers, these Chinese passengers, either soldiers or civilians, had polio? A. No.

Q. Had you ever been informed that any of them had polio? Have you ever been informed since? A. No, I never have.

Q. I show you a book and ask you if you can identify it (handing log book to the witness)? A. (Examining log book.) This is the log book of the Haines.

Q. That is the rough or the smooth log? A. The smooth log.

Mr. Gray: I ask that that be marked for identification.

(Smooth log of the Edward B. Haines was marked Leavitt Exhibit 1 for identification.)

Q. I show you another book, Captain, and ask you if you know what that is (handing log book to the witness)? A. (Examining log book) Yes, sir, that is another bridge book, smooth log.

Q. And that is your signature at the bottom of the pages? A. Yes.

Mr. Gray: I ask that that be marked for identification as Leavitt Exhibit No. 2.

(Smooth log of the Edward B. Haines was marked Leavitt Exhibit 2 for identification.)

Q. Referring again to Leavitt Exhibit No. 1 for identification, are those your signatures at the bottom of the various pages (handing Leavitt Exhibit 1 for identification to the witness)? A. (Examining log book) Yes.

Q. Do you know where the rough deck logs are of the Haines for that voyage? A. I don't know. It was on the ship when I left.

1226

Q. And you left the ship when, in 1946? A. Somewhere around there, yes. On my return to the States I left the Haines.

Q. Did any of the crew on board the ship have any inoculations against various diseases before they left New York or during the voyage? A. Not that I know of, outside of the 12 or 15, they got penicillin.

Q. They got penicillin for venereal disease? A. Yes.

Q. But did anybody have any inoculations for paratyphoid or small-pox? A. We got seven inoculations one day, and what they were, I don't know.

Q. And where did you get them, in New York? A. No.

1227

Q. It was during the voyage? A. No, in Port Said.

Q. In Port Said? A. That's right.

Mr. Gray: That is all.

Re-cross Examination by Mr. Rassner:

Q. Captain, you were asked by Mr. Gray about men being treated for venereal disease. Now, you do not know what each and every one of the 15 men you mentioned were sick with, do you? A. Venereal disease.

Q. All of them? A. Yes, sure.

Q. The 15 men were sick with venereal disease? A. Yes; that is what the pharmacist reported to me.

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Libellant's Exhibit 2.

Q. You do not know whether the pharmacist reported that McAllister had a venereal disease or not, do you?

A. No, I don't know.

Q. And for all you know he may have reported McAllister as another venereal disease case? A. He could have.

Q. He could have; isn't that so? A. Yes, he could have.

Q. And as far as you were concerned, Captain, you were trying to take care of sick men, you were not particularly taking care of one in preference to another?

1229

A. Yes.

Q. You did what you could to help the pharmacist's mate? A. That's right.

Q. And as far as you know, all you had there were men suffering with venereal disease? A. That's right.

Q. And if he reported McAllister as sick, then it would be your recollection that he reported him as being sick with a venereal disease? A. That's right.

Q. And that is the only kind of reports that were given to you? A. That's right.

1230

Q. No reports were made to you by the pharmacist mate as to anybody, McAllister or anybody else, having anything other than a venereal disease; is that right? A. That's right.

Q. That is right, is it not? A. The pharmacist's mate, he come up in the morning and he would report to me, "Another one," he would say, that's all.

Q. He may have said, "Another one," meaning another man with venereal disease, when he reported to you the fact that McAllister was sick? A. Sure, maybe he did.

Mr. Rassner: That answers my question, Captain, thank you.

Mr. Gray: Thank you, Captain.

Respondent's Exhibit C.

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JOHN C. McCAULEY, JR., M.D.
 49 EAST 78TH STREET
 New York 21, N. Y.

 REGENT 7-4411

January 6, 1953

Mr. Horace Gray
 42 Broadway
 New York 4, N. Y.

Dear Sir:

1232

Following is the report of my examination of the patient described below on this date in my office.

NAME: Robert A. McAllister.

ADDRESS: 237 West Bertsch St., Lansford, Pennsylvania.

AGE: Thirty-two years of age.

OCCUPATION: Prior to illness, Marine Engineer. Since 1949, Clerical work, including stenography and typing.

PHYSICIAN: No medical attention since 1949.

1233

HOSPITALS:

- 1—Marine Hospital, Tsingtao, North China.
- 2—Hospital Ship Repose at Shanghai, China.
- 3—Naval Hospital at Guam.
- 4—Marine Hospital, San Francisco, California.
- 5—Marine Hospital, Staten Island, N. Y.
- 6—Bellevue Hospital, New York City.

PREVIOUS ACCIDENTS OR OPERATION: Denied.

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Respondent's Exhibit C.

HISTORY: The patient states that in November 1945 while aboard a ship in Chinese waters, he was taken ill. He was transferred to a hospital within the next ten days.

According to the patient's history, he apparently had no respiratory difficulties or difficulty in swallowing early in his illness.

He recalls that while being transferred, oxygen was made available to him, but it was not necessary to use it.

1235

He was treated as a non-ambulant individual until August 1946, at which time he was equipped with crutches and a brace, and did his first standing in Bellevue Hospital.

PRESENT COMPLAINTS: The patient outlines little in the way of subjective complaints, other than the deficiencies of his physical handicap.

He does describe that he is in some difficulties on slippery surfaces and consequently, has more trouble in wet weather.

There are occasions when he has some skin discomfort by reason of the leather bands of his brace in the left leg, and he is conscious of coldness in the left lower extremity in cold weather, but never to the point of pain.

He achieved complete independence of a wheel chair in July 1947 and has not utilized one since that time.

1236

In getting about he uses regular means of transportation—buses and subways.

On question, he has no knowledge of acquiring colds or respiratory infections more frequently than he did prior to his illness.

He is troubled on occasions with bronchitis.

On question as to any awareness of weakness in the upper extremities, he has none under ordinary circumstances, but occasionally is conscious of transient cramp-like sensations in the muscles about the left shoulder and in the upper extremities on sudden forceful use of these extremities, or after sustained activity of standing or walking. He describes that he can walk about six blocks without significant fatigue.

EXAMINATION: He is of fair height and fair weight for his height and appears in good general physical condition. Muscles about the shoulders and upper extremities show unusually good development.

He walks with the use of two crutches and wears a long lower extremity brace to the left side.

His gait under these circumstances is one of good balance, security, and speed,—of the three point variety, advancing the left or braced lower extremity, with the crutches, but bearing little or no weight through it.

He carries out the requirements of sitting, getting to his feet, dressing, application and removal of his brace, with good facility.

1238

His standing posture without crutches, is accomplished with some flexion at the left hip and knee, and with the right in full extension at these same joints. Under these circumstances, there is some downward tilt of the pelvis on the left and a mild left dorso-lumbar scoliosis.

With crutches, he stands with some increased erectness of the trunk. His sitting posture is stable without the use of the upper extremities and under these circumstances, the back shows a moderate increased posterior curve in the dorsal region and a mild deviation to the left in the lumbar region, and with the pelvis lowered on the left side, due to increased atrophy of the buttock on this same side.

1239

On the table the patient lies recumbent with no marked increase of the lumbar lordosis, with the hips in apparent neutral extension and the knees extended to one hundred seventy-five degrees on the right, and one hundred seventy degrees on the left.

With the lumbar spine flat against the table, the right lower extremity comes into neutral extension at the hip—the left lower extremity is limited in extension by fifteen to twenty degrees.

The leg length measurements, both actual and practical, are the same on both the right and left sides.

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Respondent's Exhibit C.

CIRCUMFERENTIAL MEASUREMENTS OF THE THIGHS AND LEGS:

R.T.	12 $\frac{1}{2}$ ".	R.C.	13 $\frac{1}{4}$ ".
L.T.	11 $\frac{3}{4}$ ".	L.C.	10".

1241

There is a lower skin temperature evident in both lower extremities beyond the lower thighs, more marked distally and more marked on the left than on the right. There is considerable cyanosis and pigmentation of the left lower leg and foot,—similar changes, but much less, are present in the right. There is some hyperhidrosis of the skin of the lower legs and feet, more marked on the left than on the right.

MUSCLE EXAMINATION:

Head and Neck—Extensors, good to normal.
Flexors, good.
Rotators, good.

1242

Shoulder girdles—no evidence of significant weakness, except for the pectoral muscles on the left side, which show marked atrophy. Forward flexion of the shoulder girdle, however, is carried out with fairly good strength on this side.

Upper Extremities: Normal muscle values are found at the shoulder joints and throughout the upper extremities, except for the extensors to both elbows. When these are tested against acute flexion, their rating is good minus,—but when tested against full extension of the elbows, their rating is good plus.

Trunk:—Flexors, fair minus.

Extensors, good minus.

Lateral flexors, fair plus, right and left.

Hip elevators, fair on the right, good on the left.

Respondent's Exhibit C.

1243

Lower Extremities:

Right:

Hip: Extensors, good; Abductors, fair minus; Flexors, zero; Rotators, (external) good; Rotators (internal) fair plus.

Knee: Extensors, zero; Flexors, fair.

Ankle: Dorsal flexors, fair plus; Invertors, (anterior tibial), zero; (posterior tibial), fair plus; Plantar flexors, fair minus; Evertors, good.

Toes: Extensors, good; Flexors, fair plus.

Left:

1244

Hip: Extensors, zero; Abductors, zero; Flexors, fair plus; Rotators (external), fair minus; Rotators (internal), fair minus.

Knee: Extensors, zero; Flexors, poor minus (biceps only).

Ankle: Dorsal flexors, zero; Invertors, zero; Plantar flexors, poor minus; Evertors, zero.

Toes: Extensors, zero; Flexors, poor minus.

CONCLUSIONS: The findings in this instance are those of an apparently well thirty-two year old male, with a history of acute anterior Poliomyelitis, onset seven years ago.

1245

The residual effects of that illness have left him with a permanent condition of extensive paralysis and weakness, involving both lower extremities, and moderate weakness involving the trunk.

There has been a fortunate good preservation of muscle power in the upper extremities.

His present status is one of complete independence for self care, and of competence for limited ambulant activities, utilizing crutches and one lower extremity brace.

His capacity for work is that of a sedentary occupation. According to his history and according to the present physical findings, he has utilized his capacity for occupa-

1246

Respondent's Exhibit D.

tional performance and physical activities quite adequately in terms of his potential.

At the present time there are found no limitations in ranges of joint motion in the trunk or lower extremities of proportions that significantly interfere with the maximum utilization of his handicap.

In my opinion, there are no present indications for surgical procedures that could be expected to enhance his physical capacity, or are they needed to overcome any subjective complaints.

1247

Very truly yours,

JOHN C. McCAULEY, JR.

JOHN C. McCAULEY, JR., M.D.

49 East 78th St., N. Y. C. 21

JCMcC:KC

Respondent's Exhibit D.

REPORT OF ILLNESS

1248

S.S. Edward B. Haines Voy. No. 7
Owner or Operator—

Cosmopolitan Shipping Co., Inc.

Date of Sailing—July 31, 1945

THE PATIENT

1. Name McAllister, Robert Alexander. Certificate No. Z-272774.

Address 235 Bertsch Street; Lansford, Pa.

Rating Second Engineer. Citizen or alien Citizen.

Age 25. Color White. Sex Male. Married or single
Married.

Name of nearest relative Ann McAllister. Relationship
Wife.

Address same as above.

Respondent's Exhibit D.

1249

2. (a) In whose employment when taken ill Cosmopolitan Shipping Company, Inc. (b) How long employed 4½ months. (c) Wages per (Week, Month) \$220.00 per month.
3. (a) Date man signed on July 20, 1945. (b) Where New York. (c) Articles (Foreign or) F. (d) Did he submit to physical examination prior to employment? Yes. (e) By whom examined WSA (New York). (f) Where examined 107 Washington St.
4. (a) Date Discharged December 1st, 1945 (b) Where Tsingtao, China. (c) Before whom Captain Leaslett. (d) Amount of wages paid Advance (\$76.02). (e) Disposition personal effects Cared for by patient. 1250
5. Date crew paid off for this voyage (a) Date expected to terminate voyage: (b) Port
6. Illness contracted: (a) Date 11/24/45. (b) Hour — (c) Place At Sea Aboard. (d) To whom first reported Patrick E. Napier, Pur.-Ph. M. (e) When same day. (f) Location of vessel when illness first reported At Sea—Shanghai toward Tsingtao. (g) Sick person's version of how illness was contracted and cause thereof: 1251

ROBERT A. McALLISTER
(Sick person's signature)

7. Physical signs and symptoms
8. Diagnosis (for observation).
9. Treatment (give full details)
10. Condition of patient on discharge from vessel no appetite, dizziness, unable to hold food on the stomach—weak.

1252

Respondent's Exhibit D.

11. Final disposition of patient
12. If sent to hospital, state where, when admitted, and at whose request Division Field Hospital #1 6th Marine Div. Tsingtao, China. Admitted 11/30/45. Lt. Cmdr. D. J. Giorgio USN—MC.
13. Probable period of disability
14. Witnesses version as to whether disability due to misconduct

1253

15. If ill before embarkation, by whom treated No. (a) Where (b) How long
16. Similar previous illness if any: (a) When (b) When (c) Detail
17. Remarks

Names of Persons Who Knew of Illness
and Treatment Afforded
Patrick E. Napier, Purser/Ph.M.

1254

Home and Mailing Addresses
Route 12 Box 220 Sayler Park
Station—Cincinnati 33 Ohio

Respondent's Exhibit H.

1255

COSMOPOLITAN SHIPPING CO., INC.

42 BROADWAY, NEW YORK, N. Y.

General Agent For

THE UNITED STATES OF AMERICA

WAR SHIPPING ADMINISTRATION

Name: Robert A. McAllister Rating: Second Engineer

Vessel: S. S. "Edward B. Haines" Voyage No: Seven

Watch Hours: 12-4 Dept.: Engine Rate per Hour: \$1.25

OVERTIME

1256

Page #2

Date	Type of Work	Navy Time from to	Total Hours
Sept. 29-30	Night Engineer (Shanghai)	1200 0300	15
Oct. 1-2	Night Engineer	1700 0800	15
Oct. 4-5	Night Engineer	1700 0800	15
Oct. 7	Night Engineer	0300 1700	14
Oct. 9-10	Night Engineer	1700 0800	15
Oct. 12-13	Night Engineer	1700 0800	15
Oct. 14-15	Night Engineer	1700 0800	15
Oct. 17-18	Night Engineer	1700 0800	15
Oct. 20-21	Night Engineer	1200 0300	15
Oct. 22-23	Night Engineer	1700 0800	15
Oct. 25-26	Night Engineer	1700 0800	15
Oct. 28	Night Engineer Sunday	0300 1700	14
Oct. 30	Night Engineer	1700 2400	7
Nov. 14-15	Night Engineer	1700 0800	15
Nov. 17-18	Night Engineer Weekend	1200 0300	15
Nov. 19-20	Night Engineer	1700 0800	15
Nov. 26	Night Engineer	0000 0800	8

1257

Signed Off at Tsingtao, China (December 1, 1945)

Totals

238 297.50

RECAP

Sheet #1—238 hrs. 297.50

2—38 47.50

276 hrs.

\$345.00

1258

Respondent's Exhibit H.

Certified Correct
H. O. Mjoen, Ch. Engr.

Approved
Cosmopolitan Shipping Co., Inc.
By T A

B. R. Leavitt
Master

Calculations Correct
RA

Time Rate and Amount Correct
Robert A. McAllister
Member of Crew

1259

Duplicate—To General Agent—with Duplicate Payroll

Note: Overtime will not be included on voyage pay roll unless submitted promptly on arrival properly certified by department head and approved by the Master.

Respondent's Exhibit J.

McAllister, R.A. 1st Lt. of SS Haines has been admitted to Div. Field Hosp. #1, 6 Mar. Div. for diagnosis & treatment. It is not advisable that he be released at this time. Diagnosis has not been established.

1260

D. J. GIORGIO
Lt. Cdr. M. C. U. S. N.

Respondent's Exhibit L.

1261

DR. R. WARD

Works by

From "A Bibliography of Infantile Paralysis 1789-1949"

-
7774. Sabin, A.B., and Ward, R.

Distribution and elimination of virus in human poliomyelitis, *J. Bact.* 41:49, 1941.

7775. Sabin, A.B., and Ward, R.

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Flies as carriers of poliomyelitis virus in urban epidemics, *Science* 94:590, Dec. 19, 1941.

7776. Sabin, A.B., and Ward, R.

Natural history of human poliomyelitis; distribution of virus in nervous and non-nervous tissues, *J. Exper. Med.* 73:771, June 1941.

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Natural history of human poliomyelitis; elimination of virus, *J. Exper. Med.* 74:519, Dec. 1941.

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7778. Sabin, A.B., and Ward, R.

Nature of non-paralytic and transitory poliomyelitis in rhesus monkeys inoculated with human virus, *J. Exper. Med.* 73:757, June, 1941.

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Poliomyelitis in a laboratory worker exposed to the virus, *Science* 94:113, Aug. 1, 1941.

7780. Sabin, A.B., Ward, R., Rapoport, S., and Guest, G.M.

Respondent's Exhibit L.

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Neuroinvasiveness of poliomyelitis virus in relation to vitamin D nutrition, *Proc. Soc. Exper. Biol. & Med.* 48:451, Nov. 1941.

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Behavior of poliomyelitis virus in *Cynomolgus* monkeys infected by the oral route, *J. Bact.* 43: 86-87, Jan. 1942.

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Insects and epidemiology of poliomyelitis, *Science* 95:200-301, Mar. 20, 1942.

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Insects and epidemiology of poliomyelitis, *Science* 95:169, Feb. 13, 1942.

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Natural history of experimental poliomyelitis infection; studies on centrifugal spread and elimination of virus in intrasciatically inoculated rhesus monkeys, *J. Exper. Med.* 75:107, Jan. 1942.

8376. Ward, R., Sabin, A.R., Najjar, V.A., and Hold, L.E., Jr.

Thiamin excretion tests in children with paralytic poliomyelitis, *Proc. Soc. Exper. Biol. & Med.* 52:5, Jan. 1943.

8477. Horstmann, D.R., Ward, R., and Melnick, J.L.

Persistence of virus excretion in the stools of poliomyelitis patients, *J.A.M.A.*, 126:1061, Dec. 23, 1944.

8605. Ward, R.

Epidemiology of poliomyelitis, *J. Bone & Joint Surg.* 26:829, Oct. 1944.

8606. Ward, R., and Sabin, A.B.

The presence of poliomyelitis virus in human cases and carriers during the winter, *Yale J. Biol. & Med.* 16:451, May 1944.

8743. Melnick, J.L., Horstmann, D.M., and Ward, R.

Intraspinal inoculation of infective human stools as a method of producing poliomyelitis in the monkey, *J. Infect. Dis.* 77:13-24, July-Aug. 1945.

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8818. Ward, R., Melnick, J.L., and Horstmann, D.M.

Poliomyelitis virus in fly-contaminated food collected at an epidemic, *Science* 101:491-493, May 11, 1945.

8973. Horstmann, D.M., Ward, R., and Melnick, J.L.

The isolation of poliomyelitis virus from human extra-neural sources; persistence of virus in stools after acute infection, *J. Clin. Investigation* 25:278-283, Mar. 1946.

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9019. Melnick, J.L., Horstmann, D.M., and Ward, R.

The isolation of poliomyelitis virus from human extra-neural sources; comparison of virus content of blood, oropharyngeal washings, and stools of contacts, *J. Clin. Investigation* 25:275-277, Mar. 1946.

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The isolation of poliomyelitis virus from human extra-neural sources; search for virus in the blood

Respondent's Exhibit L.

of patients, *J. Clin. Investigation* 25:284-286, Mar. 1946.

9294. Horstmann, D. M., Melnick, J.L. and Ward, R., and Sa Fleitas, M.J.

The susceptibility of infant rhesus monkeys to poliomyelitis virus administered by mouth; study of distribution of virus in tissues of orally infected animals, *J. Exper. Med.* 86:309-323, Oct. 1947.

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Fly-abatement studies in urban poliomyelitis epidemics during 1945, *Pub. Health Rep.* 62:910-922, June 20, 1947.

9524. Ward, R.

Poliomyelitis; review of its natural history, *Physiotherapy Rev.* 27:213-218, July-Aug. 1947.

9525. Ward, R., and Walters, B.

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PUBLICATIONS—DR. ROBERT WARD 1949-52

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Viruses of Poliomyelitis. *Am. J. Med.* 6:551, 1949.

(With D. Rader, M.M. Lipton and J. Freund) Formation of Neutralizing Antibodies in Monkeys After Infection of Poliomyelitis Virus. *Fed. Proc.* 9:393, 1950.

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Paralytic Poliomyelitis Following Immunizing Injections. *Editorial J. Ped.* 38:781, June 1951.

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(With G. A. LoGrippo, D.P. Earle, Jr., B.B. Brodies, I. Graef, R. Bowman) The Effect of Drugs on the Excretion of Theiler's Virus (TO) by Mice. *Am. J. of Hyg.* 55:55-69, 1952.

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1274

1275

1276

Opinion.

Mercurial Compound in Suppressing Intestinal Carriage of Theiler's Virus (TO) in Mice. *Am. J. of Hyg.* 55:70-73, 1952.

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Chapter on Poliomyelitis in "Holt's Diseases of Infancy and Childhood", 12th edition (IN PRESS—1953).

1277

Opinion.

[SAME TITLE]

Dated: March 11, 1953.

INCH, J.

1278

Libellant brings this suit under the Suits in Admiralty Act (46 U. S. C. A. Sec. 741 *et seq.*). At the trial, proctor for libellant withdrew the allegations of the original libel and amended the libel to sound in negligence alone. The negligence with which respondent was then charged in the amended libel was (1) that it permitted the poliomyelitis virus to be spread by "carriers" so as to cause libellant to become infected with the disease while employed as a seaman aboard respondent's ship, the S. S. "Edward B. Haines", on the China coast during November, 1945, and (2) that respondent's "failure to treat" libellant caused his condition to become aggravated. Thus libellant withdrew his original claim for maintenance and cure, and likewise withdrew his original claim that the issue of respondent's negligence was *res adjudicata* in favor of libellant as the result of a jury verdict in a prior action against respondent's General Agent which was sustained on appeal. (*McAllister v. Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4, reversed on other grounds, 337 U. S. 783.)

Libelant signed on the "Haines" as a Second Assistant Engineer on July 23, 1945 at a monthly wage of \$220 plus overtime. Prior to sailing libelant passed a physical examination by doctors of the War Shipping Administration. The vessel proceeded via the Suez Canal to the Far East, arriving at Shanghai on September 26, 1945. It thereafter remained in Chinese waters until December 3, 1945. The master of the vessel having been warned that there was poliomyelitis and other contagious diseases ashore at Shanghai, and that poliomyelitis "was all over down there . . . in China and all through the tropics", caused notices to be posted on the ship warning members of the crew of the existence of poliomyelitis and other diseases ashore and cautioning them to exercise care in eating and drinking and to avoid association with the inhabitants ashore. On several occasions the master mustered the crew and personally warned them to the same effect. Libelant testified that he obeyed these warnings, and there is no evidence in the record to the contrary.

1280

The "Haines" took a short trip to Hong Kong and arrived back at Shanghai on November 11, 1945. At that time a number of Chinese coolies were allowed to come aboard to perform stevedoring work, and prior to the ship's departure for Tsingtao on November 23, 1945, 40 to 50 Chinese soldiers, in addition to 25 Chinese truckdrivers and 25 Chinese mechanics, were also taken aboard as passengers.

1281

The toilet facilities then provided by the ship for the Chinese who thus came aboard consisted of a temporary wooden trough extending over the ship's side with running water supplied to it by a hose laid on the deck. Libelant testified that because the hose was turned off he was required on one or two occasions to go up on deck and open the valve. In addition, the master of the ship testified that "no arrangements were made" to keep the Chinese personnel from using the ship's regular toilet facilities, "that was up to the officers, to keep them out of

1282

Opinion.

their quarters, that is all." There was further evidence that the Chinese did in fact use the crew's toilet facilities and that they also used a common drinking fountain on deck.

The above is substantially the same proof which was adduced on the prior trial against respondent's General Agent and concerning which Judge Augustus N. Hand, writing for our Court of Appeals, stated:

1283

"The plaintiff also contends that the defendant was negligent in failing to protect him properly from infection by polio, while the vessel was at Shanghai prior to November 1, 1945. In our opinion, the jury might properly find that his infection was caused by conditions negligently permitted to exist on shipboard at that time which we have already outlined and which were conducive to the transmission of polio. The defendant argues however that plaintiff might have contracted polio when he took shore leave at Shanghai as he frequently did during that period. It is undoubtedly true that no one can be certain where he contracted the disease, but he had been warned by notices posted on the ship that there was danger of contracting polio in that port and to avoid associating with coolies when on shore and to eat his meals at American clubs available to seamen. This warning coupled with the fact that there was no evidence that the plaintiff did not give heed to it made it permissible for the jury to find that he became infected on shipboard due to negligence of the defendant rather than on shore. Therefore we find it unnecessary to determine whether conditions at Shanghai were such that plaintiff should have been protected by being denied shore leave. We accordingly hold that there is a basis in the record for a finding by the jury that the defendant was negligent in failing to protect the plaintiff from contact with polio infection * * *". (*McAllister v. Cosmopolitan Shipping Co.*, *supra*, at pp. 6 and 7).

1284

Opinion.

1285

In my judgment libelant established by a preponderance of credible evidence that respondent was guilty of negligence in permitting conditions to exist on shipboard which were conducive to the transmission of polio, and that libelant was unduly exposed to infection from these conditions, and it may reasonably be inferred from the evidence that libelant contracted polio on shipboard due to the negligence of respondent rather than having contracted it ashore.

Since this is a sufficient basis for a decree in favor of libelant, it becomes necessary to discuss the second ground of negligence with which respondent is charged, namely that respondent failed to provide libelant with prompt and adequate medical treatment. However, in order that there may be a determination of all the issues presented, in the event of an appeal, I shall proceed to pass upon that question.

1286

The vessel left Shanghai on November 23, 1945, and the credible evidence clearly establishes that libelant first reported his symptoms to the Purser on November 24, 1945 while the vessel was at sea enroute to Tsingtao. It is likewise clear from all the documentary proof, and other oral proof, that libelant voluntarily continued to perform his regular duties until 8 A. M. on November 26, 1945, after the vessel had anchored off Tsingtao. Libelant was not required to perform any duties after he took to bed, and he was given complete rest on board and was provided with such food as he would accept. It is also plain that libelant's symptoms while on shipboard were of such a nature that the ship's personnel cannot be charged with negligence for failing to have diagnosed them as the early stages of polio. In fact no diagnosis of polio was made at the Marine Corps Hospital to which libelant was admitted from the ship on December 1, 1945, and no such formal diagnosis was made until December 11, 1945, when he was a patient aboard the hospital ship "Repose". In other words, it was only after libelant had been in a hospital under the care of physicians for eleven days that his condition was diag-

1287

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Opinion.

nosed as poliomyelitis. Under these circumstances I cannot find that respondent was guilty of negligence in its care and treatment of libelant.

Libelant was twenty-five years of age at the time of his illness. At the present time he is permanently paralyzed in both legs, and gets about by means of crutches and a brace on one leg. His wages as a Second Assistant Engineer were \$220 per month, plus overtime and maintenance. Evidence has been introduced as to the increased scale of wages paid to Chief and Assistant Engineers since 1945. It also appears that libelant became employed for the first time after his illness in October of 1949 as a clerk at \$35 per week, and that he has been steadily employed up to the present time in various clerical capacities earning on an average of at least \$45 to \$50 per week.

In arriving at the amount of libelant's damages I have taken into account his loss of both past and prospective earnings and his pain and suffering. On the other hand I have also considered the extent to which he has become rehabilitated, and the capitalization of money paid at the present time. Taking all the above factors into consideration, I am of the opinion that a just award for the damages suffered by libelant is \$80,000.

Respondent's motion made at the conclusion of the trial to dismiss the libel is denied.

Findings of fact and conclusions of law are being filed simultaneously herewith.

Settle decree.

s/ ROBERT A. INCH,
Chief Judge, U. S. District Court.

1-89

1290

Findings of Fact and Conclusions of Law.

1291

[SAME TITLE]

Dated: March 11, 1953.

FINDINGS OF FACT.

1. Libelant signed on the S. S. "Edward B. Haines" on July 23, 1945 as a Second Assistant Engineer at a monthly wage of \$220 plus overtime.

1292

2. The vessel was owned and operated by respondent, United States of America.

3. Prior to sailing from New York City libelant passed a physical examination by doctors of the War Shipping Administration.

4. The S. S. "Edward B. Haines" proceeded via the Suez Canal to the Far East, arriving at Shanghai, China on September 26, 1945.

5. The vessel thereafter remained in Chinese waters until December 3, 1945.

1293

6. The master of the vessel having been warned that there was poliomyelitis and other contagious diseases ashore at Shanghai and that poliomyelitis "was all over down there * * * in China and all through the tropics", caused notices to be posted on the ship warning members of the crew of the existence of poliomyelitis and other diseases ashore and cautioning them to exercise care in eating and drinking and to avoid association with the inhabitants ashore.

1294

Findings of Fact and Conclusions of Law.

7. On several occasions the master mustered the members of the crew and personally warned them to the same effect.

8. Libelant obeyed these warnings, and there is no evidence in the record to the contrary.

1295

9. The S. S. "Edward B. Haines" took a short trip to Hong Kong and arrived back at Shanghai on November 11, 1945. At that time a number of Chinese coolies were allowed to come aboard to perform stevedoring work, and prior to the ship's departure for Tsingtao on November 23, 1945, 40 to 50 Chinese soldiers, in addition to 25 Chinese truckdrivers and 25 Chinese mechanics, were also taken aboard as passengers.

10. The toilet facilities then provided by the ship for the Chinese who thus came aboard consisted of a temporary wooden trough extending over the ship's side with running water supplied to it by a hose laid on the deck.

1296

11. Because the hose was turned off libelant was required on one or two occasions to go up on deck and open the valve.

12. The master of the "Edward B. Haines" made no arrangements to keep the Chinese personnel from using the ship's regular toilet facilities.

13. The Chinese personnel used the crew's toilet facilities and also used a common drinking fountain on the ship's deck.

14. Respondent permitted conditions to exist on ship-board which were conducive to the transmission of poliomyelitis, and libelant was unduly exposed to infection from these conditions.

Findings of Fact and Conclusions of Law.

1297

15. Libelant contracted poliomyelitis on shipboard due to the conditions negligently permitted to exist there by respondent.

16. The S. S. "Edward B. Haines" left Shanghai on November 23, 1945.

17. Libelant first reported his symptoms to the Purser on November 24, 1945 while the vessel was at sea enroute to Tsingtao.

18. Libelant voluntarily continued to perform his regular duties until 8 A. M. on November 28, 1945, after the vessel had anchored off Tsingtao. 1298

19. Libelant was not required to perform any duties after he took to bed, and he was given complete rest on board and was provided with such food as he would accept.

20. Libelant's symptoms while on shipboard were of such a nature that the ship's personnel could not reasonably have been expected to recognize them as the early stages of poliomyelitis.

21. No diagnosis of poliomyelitis was made at the Marine Corps hospital to which libelant was admitted from the ship on December 1, 1945. 1299

22. The first formal diagnosis of libelant's illness as poliomyelitis was made on December 11, 1945 aboard the hospital ship U. S. S. "Repose".

23. The care and treatment furnished libelant aboard the S. S. "Edward B. Haines" was proper and adequate and did not aggravate the disease or result unfavorably to libelant.

1300

Findings of Fact and Conclusions of Law.

24. Libelant was 25 years of age at the time of his illness.

25. At the present time libelant is permanently paralyzed in both legs and gets about by the use of crutches and a brace on one leg.

26. Libelant became employed for the first time after his illness in October of 1949 as a clerk at \$35 per week, and he has been steadily employed up to the present time in various clerical capacities earning on an average of at least \$45 to \$50 per week.

27. As a result of his illness libelant was damaged in the amount of \$80,000.

CONCLUSIONS OF LAW.

I. Respondent was negligent in permitting conditions to exist on shipboard which were conducive to the transmission of poliomyelitis and in unduly exposing and causing libelant to become infected with poliomyelitis from these conditions.

II. Respondent was not negligent with respect to the care and treatment which it provided libelant aboard the S. S. "Edward B. Haines".

III. Libelant is entitled to a decree in his favor for \$80,000.

s/ ROBERT A. INCH,
Chief Judge, U. S. District Court.

1302

Final Decree.

1303

[S A M E T I T L E]

This cause having duly come on to be heard before me on the 12th, 13th, 14th and 15th days of January, 1953, and said action having been concluded on the 21st day of January, 1953, and on the pleadings and proofs adduced by the respective parties, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had thereon, and the Court fact and conclusions of law filed herein on March 11, 1953, having handed down its decision in writing, findings of finding that the respondent, United States of America is liable in the sum of Eighty Thousand (\$80,000.00) Dollars, it is

1304

Now, on motion of Bertram J. Dembo, proctor for the libelant,

ORDERED, ADJUDGED AND DECREED that the libelant, Robert A. McAllister recover of and from the respondent, United States of America the sum of Eighty Thousand (\$80,000.00) Dollars, the amount of the damages sustained by the libelant, plus the costs of the libelant as taxed in the sum of \$51.50, making a total sum of \$80,051.50, together with interest according to law from the date of entry of this decree until paid.

1305

Dated, Brooklyn, New York, March 20, 1953.

ROBERT A. INCH,
U. S. D. J.

1306

Respondent's Notice of Appeal.

[S A M E T I T L E]

Sirs:

1307 PLEASE TAKE NOTICE that United States of America, the respondent in the above entitled cause, hereby appeals to the next United States Court of Appeals for the Second Circuit, to be held in the United States Court House, Borough of Manhattan, City and State of New York, from the final decree of this Court entered herein on the 20th day of March, 1953, and from each and every part of said decree.

Dated, Brooklyn, N. Y., April 7, 1953.

Yours, etc.,

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent,

1308 GRAY & WYTHE,
Of Counsel,
Office & P. O. Address,
42 Broadway,
New York, N. Y.

To:

PERCY G. B. GILKES, Esq.,
Clerk, U. S. District Court,
For the Eastern District of New York.

BERTRAM J. DEMBO, Esq.,
Proctor for Libellant,
220 Broadway,
New York 7, N. Y.

Respondent's Assignments of Error.

1309

[S A M E T I T L E]

Respondent, United States of America, hereby assigns error in the rulings, findings of fact, conclusions of law and decision of the District Court herein, as follows:

1. In that the Court improperly applied the doctrine of *res judicata* in reaching its decision and making its finding that the respondent negligently permitted the libellant to contract poliomyelitis on board the s. s. "Edward B. Haines".

1310

2. In that the Court, in reaching its decision, improperly referred to and relied upon proof adduced in the trial of a prior civil action entitled *McAllister v. Cosmopolitan Shipping Company, Inc.*, in which this respondent was not a party, and which proof was not part of the record in this action.

3. In that the Court failed to find that as yet medical science has no positive knowledge as to how or when or where the disease of poliomyelitis is contracted.

1311

4. In that the Court excluded evidence offered by the respondent to prove the lack of qualification of Doctors Frant and Di Fiore to testify as expert witnesses on the subjects of the epidemiology of poliomyelitis and the diagnosis and treatment thereof.

5. In that the Court denied the respondent's motion to strike the opinion testimony of the libellant's witnesses, Doctors Frant and Di Fiore, on the ground that the witnesses were not qualified.

6. In that the Court found that the libellant contracted poliomyelitis on board the "Edward B. Haines".

1312

Respondent's Assignments of Error.

7. In that the Court found that the libellant contracted poliomyelitis because of the negligence of the respondent.

8. In making findings of fact numbered 8, 11, 13, 14, 15 and 27.

9. In reaching conclusions of law numbered I and III.

10. In that the Court went beyond the record in holding the respondent liable for negligence.

1313

11. In that the findings of the Court that the respondent was negligent is contrary to the evidence.

12. In that the Court denied the respondent a full and fair trial upon the record before it.

13. In that the Court granted recovery to the libellant.

14. In that the Court failed to dismiss the libel.

Dated, Brooklyn, N. Y. April 7, 1953.

1314

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent,

GRAY & WYTHE,
Of Counsel,
Office & P. O. Address,
42 Broadway,
New York, N. Y.

Appellant's Designation of Record.

1215

[S A M E T I T L E]

Pursuant to Rule 49 of the Rules of Practice in Admiralty for the Courts of the United States, and Rule 75 of the Rules of Civil Procedure and the Rules of the United States Court of Appeals for the Second Circuit, the appellant hereby designates the following portions of the Record and Proceedings to be included in the Record on Appeal.

1216

1. Libel.
2. Amended Answer.
3. Interrogatories addressed to the Libellant.
4. Libellant's Answers to Interrogatories.
5. Libellant's Further Answers to Interrogatories.
6. Interrogatories Addressed to Respondent.
(Served November 14, 1952.)

1217

7. Respondent's Answers to Interrogatories.
8. Stenographer's Minutes of Trial, excluding colloquy commencing at page 2, line 2 of the Stenographer's Transcript, through page 28, line 16, of the Stenographer's Transcript.
9. All Exhibits received in evidence.
10. Opinion of the Court.
11. Findings of Fact and Conclusions of Law.
12. Final Decree.

1318

Libellant's Notice of Appeal.

13. Notice of Appeal.

14. Assignment of Errors.

Dated, Brooklyn, N. Y., April 16, 1953.

FRANK J. PARKER,
 United States Attorney,
 Proctor for Respondent-Appellant.

1319

GRAY & WYTHE,
 Of Counsel,
 Office & P. O. Address,
 42 Broadway,
 New York 4, N. Y.

To:

BERTRAM J. DEMBO, Esq.,
 Proctor for Libellant-Appellee,
 220 Broadway,
 New York, N. Y.

1320

Libellant's Notice of Appeal.

[S A M E T I T L E]

SIRS:

PLEASE TAKE NOTICE that Robert A. McAllister, the libellant in the above entitled cause, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the final decree of this Court entered herein on the 20th day of March, 1953, as fixes the amount

Libellant's Assignments of Error.

1321

of the libellant's damages in the sum of Eighty Thousand (\$80,000.00) Dollars.

Dated: New York, N. Y.
April 28, 1953.

Yours, etc.,

BERTRAM J. DEMBO,
Proctor for Libellant,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

1322

To:

FRANK J. PARKER, Esq.,
United States Attorney,
Proctor for Respondent.

GRAY & WYTHE, Esqs.,
Of Counsel,
42 Broadway,
New York, N. Y.

1323

Libellant's Assignments of Error.

[S A M E T I T L E]

Robert A. McAllister, the libellant in the above entitled cause, hereby assigns error in the proceedings, findings of fact, conclusions of law and decision of the District Court herein, as follows:

1324

Stipulation as to Exhibits.

1. In that the Court awarded damages in the sum of \$80,000, which amount is inadequate.

2. In that the Court, having found the respondent negligent, failed to make a decree in an amount greater than \$80,000.

Dated: New York, N. Y.

April 28, 1953.

1325

BERTRAM J. DEMBO,
Proctor for Libellant,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

Stipulation as to Exhibits.

[SAME TITLE]

1326

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties herein that the following exhibits received in evidence upon the trial of this action need not be printed as part of the record on appeal but that such exhibits, or any of them, may be referred to on the argument of the appeal and the original and/or true reproductions thereof may be handed up to the Court with the same force as if reproduced in the record pursuant to Rule XVIII of the Rules of the U. S. Court of Appeals for the Second Circuit:

1. Libellant's Exhibit 1, photostatic copy of Shipping Articles of the S. S. "Edward B. Haines".

Stipulation as to Exhibits.

1327

2. Libellant's Exhibit 3, printed monograph by Philip M. Stimson, M.D., entitled "Home Care of Patients With Acute Poliomyelitis".

3. Respondent's Exhibit E, certified medical record of libellant on board U. S. Hospital Ship "Repose".

4. Respondent's Exhibit F, certified medical record of libellant at U. S. Navy Hospital at Guam.

5. Respondent's Exhibit G, Rough Engine Room Log S. S. "Edward B. Haines".

1328

6. Respondent's Exhibit I, Dr. Stimson's Chart of observed courses of attacks of poliomyelitis.

7. Respondent's Exhibit K, Union Contract of National Marine Engineers Beneficial Association in effect during voyage involved.

IT IS FURTHER STIPULATED AND AGREED, that only those pages of the Engine Room Log, Respondent's Exhibit G, selected by either of the parties for presentation upon the appeal need be reproduced.

1329

Dated, New York, N. Y., April 17, 1953.

s/ FRANK J. PARKER, U. S. Attorney,
Proctor for Respondent.

By: GRAY & WYTHE, Of Counsel.

s/ BERTRAM J. DEMBO,
Proctor for Libellant.

1330

Stipulation as to Record.

[S A M E T I T L E]

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled cause as agreed on between the parties.

Dated, New York, N. Y., June 19, 1953.

1331

BERTRAM J. DEMBO,
Proctor for Libellant-Appellee-Appellant.

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent-Appellant-Appellee.

By GRAY & WYTHE,
Of Counsel.

1332

Clerk's Certificate.

1333

[S A M E T I T L E]

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America, for the Eastern District of New York, do hereby certify that the foregoing is the record on appeal in the above entitled cause, and that the last day on which to file said record is July 7, 1953.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed in the Borough of Brooklyn, City of New York, Eastern District of New York, on the 22nd day of June, in the Year of our Lord Nineteen hundred and fifty-three, and the 177th Year of the Independence of the United States.

1334

(Seal)

PERCY G. B. GILKES,
Clerk.

By MARIE BARETTI,
Deputy Clerk.

1335

[fol. 446] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1953

No. 48

Docket No. 22,779

ROBERT A. McALLISTER, Libellant-Appellee-Appellant,
against

UNITED STATES OF AMERICA, Respondent-Appellant-Appellee

OPINION—Filed November 12th, 1953

Before L. Hand, Swan and Augustus N. Hand, Circuit
Judges

Appeal from the United States District Court for the
Eastern District of New York, Robert A. Inch, Judge

From a judgment awarding libellant damages and costs of \$80,051.50 due to the alleged negligence of the respondent in permitting Chinese workers to board the respondent's ship, thus creating an unsafe condition which resulted in libellant contracting poliomyelitis, respondent appeals. The libellant appeals from the judgment of \$80,000 on the ground that it is inadequate. Judgment reversed and libel dismissed.

[fol. 447] Leonard O. Moore, United States Attorney, Proctor for Respondent-Appellant-Appellee; Horace M. Gray and Edward R. Phillips, Advocates; Bertram J. Dembo, Proctor for Libellant-Appellee-Appellant; Jacob Rassner, Advocate.

AUGUSTUS N. HAND, Circuit Judge:

Libellant brought suit against the United States under the Suits in Admiralty Act, 46 U. S. C. A. § 741 *et seq.*, to recover damages as a result of the respondent's alleged negligence in creating conditions conducive to the transmission of polio on board the War Shipping Administration Liberty Ship Edward B. Haines and for its failure to provide adequate treatment to the libellant when he

contracted poliomyelitis as a result of such conditions. The court below did not find the respondent negligent in its treatment of the libellant. However it gave judgment to the libellant for \$80,000 on the ground that the respondent had been negligent in creating conditions conducive to the transmission of polio and that the libellant contracted polio as a result of this negligence.

Libellant signed on *The Haines* as Second Assistant Engineer in New York on July 23, 1945. After stopping at various ports en route to the Far East, the vessel arrived at Shanghai on September 26, where she remained till November 1. On that date she sailed for Hong Kong, arriving November 5, and again left for Shanghai on November 7, arriving November 11. During her second stay in Shanghai, Army trucks for the Chinese Nationalist Army were loaded on board with the help of Chinese coolies, and Chinese soldiers and mechanics were taken on [fol. 448] board to be transported to Tsingtao. Much of the controversy in this case concerns the adequacy of the facilities set up for the Chinese, and the precautions taken by the master of *The Haines* to keep the Chinese segregated from the crew. The court below found that although toilet facilities were provided for the Chinese, in the manner of a temporary wooden trough extending over the ship's side, the master had made no arrangements to keep the Chinese personnel from using the ship's regular toilet facilities; that in fact Chinese personnel used the crew's toilet facilities and also used a common drinking fountain on the ship's deck and, on one or two occasions, the libellant was required to go up on deck and open the valve for the temporary latrine. As a result of these conditions the libellant claims to have contracted poliomyelitis.

The charge of negligence in treatment and care of the libellant while aboard *The Haines* was based on a failure to give him adequate food and medication. The court found that he first reported his symptoms on November 24 after the ship had left Shanghai for Tsingtao; that he was not required to perform duties after he took to bed, was given complete rest, and that the symptoms were such that it could not reasonably have been expected that the ship's personnel would recognize them as the early stages of poliomyelitis. The court further found that the care and treat-

ment furnished libellant on *The Haines* was proper and adequate and did not aggravate the disease.

We agree that the finding that there was no negligence in the treatment and care of the libellant is supported by the evidence. However, it is not altogether clear that the action of the respondent taken with respect to the Chinese constituted negligence. Whether a legal duty exists which would force the respondent to maintain strict segregation or, even further, keep the Chinese off the boat altogether [fol. 449] is questionable. Moreover, the respondent had warned the seamen of the dangers of contracting polio and had set up the private toilet facilities for the Chinese. If the epidemic ashore had been one of a more communicable variety, such as smallpox or yellow fever, the negligence of the respondent might be clearer.

But assuming the respondent was negligent, which seems highly doubtful, we have further difficulty with the decision of the court below. Judge Inch quoted extensively from a prior decision of this court, 169 F. 2d 4 (reversed on other grounds, 337 U. S. 783), affirming a judgment for the libellant where, in an action under the Jones Act, the jury had found the operation of *The Haines* negligent on much the same facts we have here. But that was a general verdict of a jury, based on either negligence in treatment and care, or negligence in creating conditions conducive to polio. In affirming that decision it was impossible to tell upon which theory the jury relied. Moreover, the jury as the fact finding body traditionally had more scope in reaching its result than would the judge in the present case.

The libellant has the burden of proving that the respondent's negligence caused the injury sustained, but the proof here that the libellant contracted polio from the Chinese is far from satisfactory. The incubation period of poliomyelitis is not certain, as the libellant's medical witness admitted. Estimates, as shown by the record, range from a few days to 30 or 35 days. Thus the libellant might have become infected while on shore leave in Shanghai before November 1. Moreover, he might have become infected by flies or by members of the crew who were carriers of the disease. Under these circumstances to hold the respondent liable for injuries suffered by the libellant seems to be wholly speculative as the infection might well have arisen

from various causes unrelated to the respondent's action. [fol. 450] It is impossible to prove that letting Chinese come on board, assuming that conduct was negligent, was the proximate cause of libellant's disease. Since either of the several inferences was permissible, the party having the burden of proof must lose. *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 339; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Goodrich v. United States*, 5 F. Supp. 364, 365. Thus we cannot agree that the evidence supports a finding made by the court below, that the libellant contracted polio as a direct result of the respondent's negligence.

For the foregoing reasons the judgment below in favor of the libellant is reversed and the libel dismissed.

[fols. 451-452] IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November one thousand nine hundred and fifty three.

ROBERT A. McALLISTER, Libellant-Appellant

v.

UNITED STATES, Respondent-Appellant

JUDGMENT—Filed November 12, 1953

Appeal from the United States District Court for the
Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and libel dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

United States Court of Appeals

For the Second Circuit

ROBERT A. McALLISTER,

Libelant-Appellee-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellant-Appellee.

**LIBELANT-APPELLEE-APPELLANT'S PETITION
FOR REARGUMENT AND ALTERNATIVE REMEDY**

BERNARD J. DUBOIS,

Proctor for Libelant-Appellee-Appellant.

**ARTHUR BROWN,
Of Counsel.**



United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT A. McALLISTER,

Libelant-Appellee-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellant-Appellee.

LIBELANT-APPELLEE-APPELLANT'S PETITION FOR REARGUMENT AND ALTERNATIVE RELIEF

The libelant-appellee herewith respectfully requests a rehearing of this appeal decided November 12th, 1953, or in the alternative, requests that the questions hereinafter set forth be certified to the Supreme Court of the United States and that the issuance of this Court's mandate be stayed pending action by the Supreme Court of the United States.

REASONS FOR THE PETITION

POINT I

The decision of this Honorable Court is in conflict with the decision by the Supreme Court of the United States in the case of *Lavender v. Kurn, et al.*, 66 S. Ct. 740, 327 U. S. 645.

This Court has stated that the inference drawn by Judge Inch was permissible.

On page 107 of the opinion, this Court stated " * * * either of the several inferences was permissible, * * * ."

This Court held that since other inferences than those found by Judge Inch were permissible " * * * the party having the burden of proof must lose."

This is at variance with the statement by the Supreme Court of the United States in the *Lavender* case, *supra*, which stated at page 653:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

POINT II

The decision in the case at bar is in conflict with the decision by this Court in the case of *McAllister v. Cosmopolitan Shipping Co.*, 169 Fed. 2d 4, where on page 7, it stated as follows:

"The defendant argues however that plaintiff might have contracted polio when he took shore leave at Shanghai as he frequently did during that period. It is undoubtedly true that no one can be certain where he contracted the disease, but he had been warned by notices posted on the ship that there was danger of contracting polio in that port and to avoid associating with coolies when on shore and to eat his meals at American clubs available to seamen. This warning coupled with the fact that there was no evidence that the plaintiff did not give heed to it made it permissible for the jury to find that he became infected on ship-board due to negligence of the defendant rather than on shore."

POINT III

The statement in the opinion by this Court that "it is impossible to prove that letting Chinese come on board, assuming that conduct was negligent, was the proximate cause of libellant's disease," is at variance with the opinion by the Supreme Court of the United States in the case of *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 64 S. Ct. 724.

Libelant-appellee proved and respondent-appellant admitted that it was negligent conduct to let the Chinese in question come aboard the vessel.

1. The captain admitted that there was a polio epidemic ashore.
2. The captain admitted that he knew of this danger.
3. The captain admitted that he brought this danger aboard the vessel.

It seems reasonable to conclude that when a master knows of the grave danger of a condition ashore and, when, in the face of such known danger, he invites said danger aboard the vessel and gives it free rein aboard said vessel, such conduct is not that of a reasonably prudent master under the circumstances.

This conduct was held to constitute negligence by this Court in the *McAllister* case, *supra*.

On the identical evidence (without the admissions by the master which lent support to the libellant's position in the present trial) this Court held (p. 7) " * * * the defendant was negligent in failing to protect the plaintiff from contact with polio infection * * * "

In view of the prior holding by this Court, the distinction made by this Court that the jury's verdict was "a general verdict" and that therefore "• • • it was impossible to tell upon which theory the jury relied," is contrary to its prior holding in the *McAllister* case, *supra*.

The statement by this Court in the *McAllister* case, *supra*, is clear, concise and unequivocal, that either the exposure or the neglect was a basis for liability.

The Court clearly stated in the *McAllister* case, *supra*, (1) that the exposure was a basis for liability, (2) that the failure to give prompt and adequate treatment was also a basis for liability.

By using the words "as well as", either fault was sufficient to sustain the burden of proof.

Accordingly, this decision is in conflict with the decision by this Court in the *McAllister* case, *supra*.

Inviting a known danger aboard ship was held by this Court to constitute negligence in the McAllister case, supra, and should have been so held in the case at bar.

POINT IV

Giving consideration to the possibility of other causes of infection as a basis for reversal is in conflict with the holding by the Supreme Court of the United States in the *Sartor* case, *supra*.

The testimony of Dr. Frant was evidence which this Court had no authority to disregard nor to pass upon the weight thereof.

In the *Sartor* case, *supra*, the Supreme Court of the United States stated at page 627:

"The rule has been stated that if the court admits the testimony, then it is for the jury to decide whether

any, and if any what, weight is to be given to the testimony.' *Spring Co. v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487. * * * the jury, even if such testimony be uncontradicted, may exercise their independent judgment.' *The Conqueror*, 166 U. S. 110, 131, 17 S. Ct. 510, 518, 41 L. Ed. 937. * * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 408, 19 S. Ct. 233, 236, 43 L. Ed. 492."

The opinions of the doctors were questions of fact.

The facts proved by the libellant-appellee were as follows:

1. That it was negligent conduct on the part of the master to bring the disease aboard the vessel.
2. That the Chinese were the carriers of the disease.
3. That they infected McAllister.

The following is the evidence supporting the foregoing statements:

"Was the bringing of these men on board the ship a competent, producing cause of spreading—

Q. Of spreading polio. A. Yes.

Q. And in your opinion is that how the polio was spread to Mr. McAllister? A. Yes" (fol. 297).

The doctor explained the basis for his opinions at folios 371 and 372.

The identical proof was held sufficient by this Court to impose liability in the previous trial (*McAllister* case, *supra*) wherein the Court stated:

"The jury might properly find that his infection was caused by conditions negligently permitted to exist on shipboard at that time which we have already outlined and which were conducive to the transmission of polio" (pp. 6 and 7).

POINT V

The cases upon which respondent-appellant relied and which are mentioned in the opinion do not support the proposition of law that they purport to sustain.

In the case of *Goodrich v. United States*, 5 F. Supp. 364, 365, Judge Patterson said he did not believe the evidence and would not draw the inference, not that he could not draw the inference. Judge Patterson said at page 365:

"From the fact that there was an epidemic of the fever among the crew, the inference is a strong one that they caught it on the ship rather than on shore; that the source of the infection was on the ship itself."

He stated that he could draw one inference or the other and he drew the inference which he felt was warranted by the facts. Judge Patterson did not say in words or substance that if several inferences were permissible "• • • the party having the burden of proof must lose" (from opinion of this Court, page 107).

Even in the case of *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 339, which seems to have been overruled by the *Lavender* case, *supra*, the Court spoke of "inconsistent propositions" and not that an inference may not be drawn from a proven fact. The Court stated at page 346:

“ . . . recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.”

The whole question was summed up as follows, that an inference

“ ‘must necessarily yield to credible evidence of the actual occurrence’ ” (p. 341).

In the case of *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663, the Court found that there was no satisfactory basis from which the inference sought could be drawn. The Court did not state that if there were proof, that the trier of the facts was denied the right to draw such inference as he felt was warranted by the evidence. Judge Inch had the legal right to draw the inference he did in the case at bar.

There was no credible evidence, or any evidence for that matter, contradicting Dr. Frant's conclusion that the negligent exposure of McAllister by the master, to polio, was the direct and proximate cause of McAllister's illness.

The decision in the case at bar not only is at variance with decisions heretofore cited, but also with the holdings in the following cases wherein it appears that the universal holdings by our Courts are that the testimony of an expert witness is a question of fact to be decided by the trier of the facts, who may draw such reasonable inferences therefrom as to their minds seem just and proper.

The decision of the controversial issue by Judge Inch was not the subject of review by an Appellate Court.

The weight of an expert's testimony is for the trier of the facts. See *Public Service Co. of New Hampshire v. Elliott*, 123 Fed. 2d 2.

Acceptance or rejection of opinions of expert witnesses was a matter for the trier of the facts. See *Anderson v. Baltimore & O. R. Co.*, 96 Fed. 2d 796.

Weight of opinion evidence given by experts is a matter for the trier of the facts. See *Atlantic Coast Line R. Co. v. Sweat*, 183 Fed. 2d 27.

Weight and credibility of the testimony of an expert is a factual issue to be determined by the trier of the facts. See *O'Donnell et al. v. Geneva Metal Wheel Co.*, 183 Fed. 2d 733.

It is for the trier of the facts to say what weight, if any, should be given to opinion evidence. Opinion evidence is a factual issue to be decided by the trier of the facts. See *Preston v. Aetna Life Ins. Co.*, 174 Fed. 2d 10.

Testimony of an expert witness is to be treated the same as the testimony of any other witness as to weight and credibility. In the case of *Roettig v. Westinghouse Electric & Mfg. Co. et al.*, 53 F. Supp. 588, the Court stated at page 591:

"The testimony of an expert witness, like any other witness, is to be weighed by the trier of the fact and given such weight as it is entitled to have."

Uncontradicted testimony of an expert witness on a medical question constitutes substantial evidence sufficient to support a finding by the trier of the facts. See *Charles of the Ritz Dist. Corp. v. Federal Trade Com'n*, 143 Fed. 2d 676.

There was no contradiction by any medical expert that the exposure of McAllister occasioned by the unrestricted

use of the vessel by the Chinese, who came from an epidemic area was the direct and proximate cause of McAllister's illness.

The finding by the trier of the facts was unassailable as a matter of law by any Appellate Court. This is borne out by the decision in the *Charles of the Ritz Dist. Corp.* case, *supra*, which was argued before Circuit Judges L. Hand, Swan and Clark.

POINT VI

The decision of this Honorable Court is contrary to the holding in the case of *Stubbs v. The City of Rochester*, 226 N. Y. 516.

In the *Stubbs* case, *supra*, which was an action for damages caused by drinking contaminated water from the defendant's domestic service, resulting in typhoid fever, the Court held that though there were more than nine other causes recognized by medical authorities for typhoid fever, nevertheless this presented a factual jury question, whether the particular cause advanced by plaintiff was the proximate cause of the disease. On page 526, the Court stated as follows:

"If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable the party has complied with the spirit of the rule."

On page 527, the Court said that the complaint should not have been dismissed below, as follows:

"On the contrary the most favorable inferences deducible from the plaintiff were such as would justify a submission of the facts to a jury as to the reasonable inferences to be drawn therefrom, and a verdict thereon for either party would rest not on conjecture but upon reasonable possibilities."

Justices Cardozo, Pound and Andrews concurred.

The late Judge Marcus Campbell of the U. S. District Court for the Eastern District of New York followed this view in the case of *Lancashire Shipping Co. v. Morse Drydock & Repair Co.*, 43 Fed. 2d 750.

Libelant-appellee respectfully petitions for reargument and reconsideration of the decision by this Court dismissing the libel, or in the alternative, to certify to the Supreme Court of the United States the following questions:

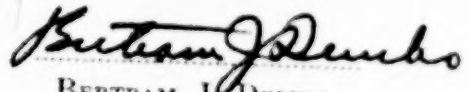
1. Does the trier of the facts have the right to choose from several inconsistent inferences, such inference as he deems the facts warrant, or does the possibility of several inferences preclude the party having the burden of proof from recovery?
2. Has the trier of the facts the right to consider medical opinion as a question of fact?

Respectfully submitted,

BERTRAM J. DEMBO,
Proctor for Libelant-Appellee-Appellant.

JACOB RASSNER,
Of Counsel.

I hereby certify that I am the proctor for the libelant-appellee-appellant in the above entitled case; that the foregoing Petition for a Rehearing is filed in good faith, upon a real and substantial ground and not for the mere purpose of delay.


BERTRAM J. DEMBO

Dated: New York, N. Y., November 27, 1953.

[fols. 465-466] IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

ROBERT A. McALLISTER, Libellant-Appellant

v.

UNITED STATES OF AMERICA, Respondent

Before L. Hand, Swan and Augustus N. Hand, Circuit
Judges

OPINION ON PETITION FOR REARGUMENT AND ALTERNATIVE
RELIEF—Filed December 3, 1953

Bertram J. Dembo, for Libellant

PER CURIAM:

Petition for reargument and to certify the cause to the
Supreme Court denied.

L. H., T. W. S., A. N. H., C. J. J.

[File endorsement omitted.]

[fols. 467-468] IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Court House, in the City of New York, on the 3rd day of
December, one thousand nine hundred and fifty-three.

ROBERT A. McALLISTER, Libellant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellant

ORDER DENYING PETITION FOR REHEARING AND ALTERNATIVE
RELIEF—Filed December 3, 1953

A petition for a rehearing and alternative relief having
been filed herein by counsel for the libellant-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Further ordered that the request to certify the questions to the Supreme Court of the United States be and it hereby is denied.

[File endorsement omitted.]

[fol. 469] Clerk's Certificate to foregoing transcript omitted in printing.

(2075)

Supreme Court of the United States

No. **566**, October Term, 19 **53**.

Robert A. McAllister,

Petitioner,

vs.

United States of America.

Order allowing certiorari. Filed April 5, 19 54.

*The petition herein for a writ of certiorari to the United States Court of Appeals for the **Second** Circuit is granted.*

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.